

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA, :

Plaintiff, : Criminal Action No.

v. : 1:16-cr-10094-LTS

ROSS MCLELLAN, :

Defendant. :

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BEFORE THE HONORABLE LEO T. SOROKIN, DISTRICT JUDGE

JURY TRIAL
Day 9

Friday, June 15, 2018
8:33 a.m.

John J. Moakley United States Courthouse
Courtroom No. 13
One Courthouse Way
Boston, Massachusetts

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P R O C E E D I N G S

(In open court.)

THE DEPUTY CLERK: The United States District Court for the District of Massachusetts is now in session, the Honorable Leo T. Sorokin presiding.

Today is June 15th, the case of United States vs. Ross McLellan, criminal action 16-10094 will now appear before this court.

THE COURT: I see all counsel and the defendant.

So I, this morning, ran into two of the jurors in the cafeteria and one of them asked me if I had a good conference and so I told him -- I didn't say what it was about. But I did say I had spoken and presented and I can report to you that maybe there's hope for you that I'm wiser and fairer and smarter now than I was on Wednesday. So maybe you'll have less problems with all my different -- whatever I do or don't do. At least there's hope.

So do we have anything to talk about?

MR. GOLDSTEIN: Well, with that in mind, Your Honor, that you could perhaps be wiser and fairer, I'd like to renew an objection to the Government presenting testimony regarding McLellan's statements to the agents who visited him at his home. It was the subject of the Court's order on June 1st, 2008, Document 405. My understanding is that now the Government is not calling him today, they're calling him

1 Monday. So I don't when the Court and the Government -- I
2 sent them an e-mail this morning that I wanted to renew this
3 objection. We can handle it this morning, we can handle it
4 Monday, whichever the Court --

5 THE COURT: If he's not coming until Monday, let's
6 see if there are any issues for today first.

7 MR. Weinberg: No, real issues --

8 You're not calling Trombly today, right?

9 MR. FRANK: No.

10 MR. WEINBERG: Just a preview, there will be some
11 evidentiary objections to one of the Government other
12 witnesses on the -- an FBI agent that's going to put on
13 certain exhibits that are offered by the Government.

14 THE COURT: Okay. Before we get to any issues,
15 with respect to today.

16 MR. FRANK: We don't have any issues for today.
17 We'd prefer to resolve issues --

18 THE COURT: I'm happy to do that. I just want to
19 first make sure. So let me just ask you this about today.
20 So who are we going to hear from today?

21 MR. FRANK: We're going to hear from James Kelly,
22 who works for AXA.

23 THE COURT: AXA is the US company?

24 MR. FRANK: Correct.

25 THE COURT: Right. Okay.

1 MR. FRANK: We are going to hear from Tom
2 Clemmenson, who is a trader on the fixed income desk.

3 THE COURT: Kelly will be something of a piece with
4 the other -- the witnesses we've heard from from the other
5 pension funds.

6 MR. FRANK: Without an accent, yes, Your Honor.

7 We'll hear from -- not so much. Actually we're
8 going to hear from Tom Clemmenson, who was a trader on the
9 fixed income desk at State Street, and we're going to hear
10 from Kristen Morris, who was a transition analyst on the --
11 at State Street in the United States.

12 THE COURT: Okay. And then after then. So that
13 would be today. Then Monday?

14 MR. FRANK: So the question is what Your Honor
15 wants to do about Monday. We have lined up two FBI agents,
16 one of them is Garrett Trombly, who's simply going to be a
17 reader of documents that we contend are admissible.

18 THE COURT: All right. Those are the ones with the
19 evidentiary issues, not as to the reading, but as to some of
20 the documents?

21 MR. WEINBERG: Yes.

22 THE COURT: All right.

23 MR. FRANK: And that should be very --

24 THE COURT: If he read everything that you wanted
25 him to read, how long?

1 MR. FRANK: Half an hour. It's short testimony.

2 THE COURT: Okay.

3 MR. FRANK: I haven't timed it, but it's about --
4 it's about 15, 16 e-mails.

5 THE COURT: Okay.

6 MR. FRANK: Then there's Special Agent
7 McGillicuddy, who's flying in from Washington for this
8 testimony. His testimony is five to ten minutes long. He's
9 the one who's going to be testifying about the interview with
10 the defendant. His testimony will be limited to statements
11 that the defendant made about his own business.

12 THE COURT: He's not going to talk about --

13 MR. FRANK: The only thing he would say about
14 ConvergeEx is he was there, because he was involved in an
15 investigation that pertained to ConvergeEx. He went to talk
16 to the defendant. The defendant was not in any way a target
17 or subject of that investigation.

18 THE COURT: He went to talk to him as a witness?

19 MR. FRANK: Correct.

20 THE COURT: Or potential witness?

21 MR. FRANK: Correct. And the only other thing he
22 would elicit that pertains is he will elicit -- I will elicit
23 from him that the defendant acknowledged having received that
24 spreadsheet that was admitted previously.

25 THE COURT: The one that Pennings talked about.

1 MR. FRANK: Correct. And that we -- and we saw
2 some e-mails about it. And that -- it would simply
3 corroborate Mr. Pennings that the defendant received this
4 from an anonymous, disgruntled ConvergeEx employee.

5 THE COURT: Pennings received it.

6 MR. FRANK: The defendant received it. Pennings
7 testified that the defendant gave it to him, that the
8 defendant didn't know where he had gotten it from, it came
9 from somewhere in Asia, and that the defendant simply told
10 the agent, I got this spreadsheet. I don't know who it's
11 from. I thought it was from a ConvergeEX disgruntled
12 employee. That's it. There's no substance on ConvergeEx.
13 The remainder of his statements will be about his business,
14 what he did at State Street, what he understood State
15 Street's practices to be.

16 THE COURT: When was the interview?

17 MR. FRANK: It was in January of 2012.

18 MR. WEINBERG: Yes.

19 MR. FRANK: So shortly after he left State Street.

20 THE COURT: I see. Okay.

21 MR. FRANK: So that will be his testimony. And
22 then we'll have a State Street witness, Scott Shaw, who will
23 testify about where bonds that are traded in the United
24 States actually -- where they clear, where title passes.

25 THE COURT: Okay.

1 MR. FRANK: And he will also testify about the
2 extent to which State Street was affected by this. And you
3 know, to that extent, I mean, there may be an issue there, to
4 the extent that he testified that they paid a criminal money
5 penalty, but his testimony is also fairly brief.

6 THE COURT: All right. And then after -- that's
7 everybody you have.

8 MR. FRANK: That's everybody for Monday. So that's
9 fairly brief testimony. That's not going to even come close
10 to fill the day. And then we have Eugene O'Callaghan, who's
11 flying in on Monday from Dublin to be prepared to testify on
12 Tuesday.

13 THE COURT: And he's another victim witness of --
14 similar piece?

15 MR. FRANK: Correct.

16 THE COURT: With a related, but different accent?

17 MR. FRANK: Very different accent. Yes, Your
18 Honor.

19 THE COURT: All right. And then that -- so then if
20 you did those Monday, then you do him Tuesday morning and
21 then you'd rest?

22 MR. FRANK: Correct.

23 THE COURT: And if -- all right. And where do you
24 all stand, in terms of scheduling?

25 MR. WEINBERG: Well, we have narrowed our witness

1 list. I think we have met all of Mr. Frank's both
2 expectations and concerns about witnesses. We've given them
3 a sequence of witnesses that -- at least a sequence of expert
4 witnesses. We will have an expert from Virginia named Mark
5 Menchel as our first witness. We're -- we have a second
6 expert that will be available on Tuesday. We think they will
7 fill the day and we're hopeful that Your Honor holds court on
8 Monday, so that we have the time on Tuesday. It sounds like
9 the Government will -- if there's no Court on Monday, between
10 NTMA and these other three witnesses, there will be a
11 Tuesday --

12 THE COURT: You would like me to have Court --
13 okay, so my question is, what if the Government went Monday,
14 presented the three -- putting aside evidentiary issues,
15 presented everything they want to present. And what about if
16 we took out of order -- or would that not work, one of your
17 experts?

18 MR. GOLDSTEIN: I don't think it's ideal, because
19 it's just discordant for him to be testifying as an expert on
20 Monday and then have the Government come in with one of their
21 victim witnesses Tuesday.

22 THE COURT: So you would prefer -- what your
23 preference is is that we go a partial day on Monday, Tuesday
24 go full day.

25 MR. WEINBERG: Yes.

1 THE COURT: And Tuesday, what, you would have after
2 that, their last witness and resting, would be one expert or
3 two? Two would certainly complete the day in your view?

4 MR. WEINBERG: Yes.

5 THE COURT: And then -- are there expert reports
6 for the experts?

7 MR. WEINBERG: There's a rather detailed disclosure
8 that we made pursuant to Rule 16. There were no reports.

9 THE COURT: Can you give me that disclosure by the
10 end of the day, just so I can read it, so I have some idea of
11 what's coming?

12 MR. WEINBERG: We can provide it to Your Honor.

13 MR. FRANK: Detail's in the eye of the holder, Your
14 Honor. It's a few paragraphs about each witness.

15 MR. WEINBERG: It's far more detailed than the
16 Government's rebuttal experts, you know, who don't have
17 reports, either.

18 MR. FRANK: Your Honor, the Government has provided
19 12 single-spaced --

20 THE COURT: At the moment, I'm not -- whatever
21 there is, I want to read it, just because it will be helpful
22 for whatever. I imagine there might be objections to various
23 experts.

24 So how long do you -- in terms of -- if we do that,
25 so Monday -- if he got everything he wanted with his three

1 witnesses, if all of your objections are overruled, that
2 would be the longest presentation on Monday. You have a
3 third -- approximately 30-minute witness and approximately
4 10-minute witness. And then who was the -- and then the
5 State Street witness?

6 MR. FRANK: Yes, he's not more than 30 minutes, 20
7 minutes.

8 THE COURT: So you have between 45 minutes and an
9 hour and a half of direct examination depending on how
10 quickly it all goes.

11 MR. FRANK: Yes, Your Honor.

12 THE COURT: How much cross, of all that, if it all
13 came in, would you have?

14 MR. WEINBERG: I don't want to give the Court a
15 final prediction. I think there will be cross on the witness
16 that will testify to the conversation with McLellan. There
17 may be cross that goes into the distinctions between
18 ConvergeEx and the transitions in this case.

19 THE COURT: It would be fair to me to --

20 MR. FRANK: Your Honor, that would be -- just so I
21 can respond to that. We've been asked not to elicit anything
22 about ConvergeEx's business practice. We're not going to
23 elicit anything about it other than what the defendant --
24 what's been already elicited. There's going to be nothing
25 further about it. So to then cross-examine an agent of the

1 FBI about his investigation of ConvergeX, we think would be
2 completely out of bounds, and we think that should be
3 resolved promptly.

4 MR. WEINBERG: And to sanitize and distort --

5 THE COURT: Hold on. At the moment, I just want to
6 stay focussed on schedule. We'll come back to evidence.

7 So you might have 15 or 20 minutes. You might have
8 an hour and a half. It's probably not going to be --

9 MR. WEINBERG: I think they'd be finished by the
10 11 o'clock break on Monday, Your Honor.

11 THE COURT: Okay. That's what I'm trying to figure
12 out. So -- and then, if we finish by -- if we're done and we
13 broke at 11:00, then Tuesday we go all day. Your two
14 experts -- assuming this -- the witness that the Government
15 has on Tuesday goes similarly, direct and cross, to the
16 others, you think you'll get on -- you might get on your
17 second expert? Will your second expert get off the witness
18 stand on Tuesday?

19 MR. WEINBERG: Predictably yes, if we had -- it
20 really depends on the length of cross.

21 THE COURT: Maybe, maybe not.

22 MR. WEINBERG: Maybe, maybe not. He's a shorter
23 expert than Mr. Menchel. He covers more territory.

24 THE COURT: And then how much more would I
25 anticipate, if you do?

1 MR. WEINBERG: I say either a day or two days,
2 depending on the usual decisions that get made regarding the
3 defense.

4 THE COURT: All right. So it would -- are you
5 likely to be -- are you going to call any other experts
6 besides this?

7 MR. WEINBERG: Probably a third expert.

8 THE COURT: All right. So there's a reasonable
9 likelihood you're going to call your rebuttal expert?

10 MR. FRANK: Yes, Your Honor, subject to whatever
11 motions the defense makes.

12 THE COURT: Right, but -- okay. And that expert
13 would be an hour on direct and then whatever cross there is.
14 So --

15 MR. FRANK: So I should just be clear that we have,
16 in an abundance of caution, designated his testimony as
17 possibly involving expert testimony. He's a fact witness.
18 He's going to offer lay opinion testimony. We think it's all
19 admissible on those grounds.

20 THE COURT: I'm just trying to figure out at the
21 moment --

22 MR. WEINBERG: Wait.

23 THE COURT: The schedule in terms of everybody gets
24 everything they want --

25 MR. WEINBERG: We should tell the Court that we

1 received -- we had a schedule for the disclosure of experts,
2 where the Government was going to disclose their experts 60
3 or 70 days before. We disclosed ours. The Government didn't
4 disclose an expert. We disclosed ours 40 days before, as we
5 were required by agreement. The Government, shortly before
6 trial, identified an expert named Mr. Minahan, from MIT. You
7 know, we didn't complain about the timing of that. Although
8 we may complain he's not a rebuttal expert.

9 And yesterday, we got notice that the Government
10 wants a second rebuttal expert, who we reserve our right to
11 challenge that, Judge.

12 THE COURT: All right. So you don't have to
13 respond to that now, Mr. Frank. I understand from your
14 expression that you don't agree.

15 And so just in terms of scheduling, so what I hear
16 is if we went Monday until 11:00, Tuesday morning, the
17 defense -- or the Government presents its live witness, you
18 go with your experts, you think you would finish your case,
19 your defense case, sometime possibly Wednesday and certainly
20 Friday.

21 MR. WEINBERG: Yes.

22 THE COURT: It would be in that range.

23 MR. WEINBERG: Yes, Your Honor.

24 THE COURT: Depending on how much you -- how many
25 people you call. But it sounds likely -- the likely outcome

1 is Wednesday or Thursday. Might be Friday.

2 MR. WEINBERG: Somewhere --

3 THE COURT: Depends some of it on cross and some of
4 it --

5 MR. WEINBERG: Somewhere in that area, Judge.

6 THE COURT: All right. And your rebuttal case, if
7 you call all of the witnesses, however they're labeled.

8 MR. FRANK: It would be short.

9 THE COURT: It would be short -- so it's possible
10 that we'll finish the case potentially Thursday, if they
11 finished Wednesday and possibly Monday, but something in that
12 time frame.

13 MR. FRANK: Yes, Your Honor.

14 THE COURT: All right. Okay.

15 MR. WEINBERG: We're ahead of schedule, Judge.

16 THE COURT: Right. I thought so, but just I wanted
17 to kind of go over it all. Okay. Fine.

18 Then this is what I'm going to do. I'm going to go
19 over the schedule with the jury at the end of the day, before
20 I send them home. I'm going to tell them -- unless one of
21 you disagrees with this -- I'm going to tell them that Monday
22 that we're going to -- we're on or ahead of schedule, that
23 the Government -- that given the shift in both the
24 combination of form witnesses and shift from the Government
25 presentation of evidence, the defense presentation of

1 evidence and scheduling the witnesses, the --

2 What we're going to do is Monday, they're going to
3 hear from three witnesses and we anticipate -- that we'll
4 certainly be done by 1:00 and there's a very strong
5 likelihood that we'll be done much earlier than 1:00, and --
6 but for scheduling and sequencing and better presentation of
7 evidence, it makes more sense to do it this way. So they'll
8 get out early on Monday.

9 Tuesday morning, we'll start at 9:00, the
10 Government will have another witness on Tuesday, who's coming
11 from overseas, and then we anticipate that will be the end of
12 the Government's case, and we'll turn to the defense case.

13 The defense will then present evidence that -- and
14 I expect that they're going to get the case no later than the
15 beginning of the following week and leave it at that for now.
16 And then we can talk a little more as we get closer, in terms
17 of the mechanics of that, and the like.

18 MR. WEINBERG: Two last matters, Judge. One is, we
19 do want, since the -- Mr. O'Callaghan is going to be planning
20 on flying over from Ireland, I assume, on -- sometime on
21 Monday, to testify Tuesday morning, you know, we do, again,
22 request that the Court exclude him. We still have not
23 received any response from NTMA. He's a witness. Were he
24 not a foreign witness, we would --

25 THE COURT: Now I'm ready to go over all of those

1 evidentiary issues, starting first on Monday, but that's
2 Tuesday, but I'm not ignoring that.

3 MR. WEINBERG: Okay.

4 THE COURT: So Monday, taking that one at a time,
5 first there's -- you have issues -- the defense has issues
6 both with the agent who's reading things, with respect to
7 what he's reading, and with respect to the admissibility of
8 the statements that Mr. McLellan is alleged to have made to
9 the other agent, and no particular issues with the State
10 Street witness, or yes?

11 MR. WEINBERG: I don't expect any -- I don't know,
12 other than reading a two and a half page 302, I don't know
13 whether Mr. Frank is going elsewhere. We will object to any
14 testimony by this witness regarding any monetary payment made
15 by State Street, any deferred prosecution.

16 THE COURT: You mean to the criminal fine or the
17 deferred prosecution?

18 MR. WEINBERG: Anything that suggests to this jury
19 unnecessarily that the bank conceded guilt, whether -- either
20 deferred prosecution or through the payment of the criminal
21 penalty as -- you know, as implicating 403 issues and
22 implicating the Sixth Amendment issues, given the Crawford
23 case, which prohibits the substantive use of a plea of a
24 co-conspirator against a defendant and I think even limiting
25 instructions would detoxify the prejudice that would be

1 generated by that kind of evidence.

2 THE COURT: So I guess my question, first, as to
3 this witness, is are you offering the deferred prosecution
4 agreement, the fact that they admitted guilt, or the criminal
5 fine paid?

6 MR. JOHNSTON: Your Honor, we don't plan to
7 introduce the deferred prosecution agreement. You ruled on
8 that. Your Honor ruled on that already. We didn't plan on
9 putting it into evidence.

10 However, we do believe the deferred -- the fact
11 that there was a deferred prosecution agreement still has to
12 come into evidence through the testimony of Mr. Shaw for two
13 independent reasons.

14 One, we need to establish that the -- and we're
15 entitled to establish that the AXA fraud affected State
16 Street as a financial institution. One of the ways that it
17 affected State Street was that, because it had a deferred
18 prosecution agreement with the Government, it had an
19 obligation to investigate and to expend resources to uncover
20 what had happened and then to report that conduct to the
21 Government. So in that instance, it expended resources to --
22 just to be able to uncover what had happened.

23 Secondly, the deferred prosecution agreement, or at
24 least the fact that the company had to pay fines as a result
25 of its employee's conduct, is also relevant to show that --

1 and something that we need to establish, is that misconduct
2 by employees can result in losses to their employer. And
3 there's -- you know, in our briefing on this, we've cited a
4 number of cases that have allowed such evidence and have
5 relied on that, on exact -- exactly the same type of evidence
6 to be able to establish that an employer -- an employee's
7 conduct can affect his financial institution employer's
8 business for purposes of the 10-year statute of limitations.
9 So we think we have to be able to elicit it on both ends.

10 But we don't need to -- I mean, the issue that we
11 face is the defense, right, doesn't want us to be able to
12 elicit the fact that the fine was paid or the magnitude of
13 the fine. But the problem is, you know, they don't want to
14 stipulate at all to the fact that any institution -- that any
15 financial institution was affected. So we still have to meet
16 our burden of proof. They may not like it. They may not
17 like the fact that that's now an element of the crime. So we
18 are perfectly open to a limiting instruction, to say this is
19 what it means for a financial institution to be affected. It
20 doesn't necessarily imply any guilt about the person --

21 THE COURT: What, if at all, is there evidence that
22 bears on the question of affecting the financial institution?

23 MR. JOHNSTON: Well, I mean, it's the fact that
24 they -- you know, we've elicited a little bit through some of
25 the other victims, who said we just cut off all business with

1 State Street. So that would be -- but of course, their
2 position is, well, that was a different fraud. That's not --
3 the AXA fraud didn't go and affect State Street that way.
4 You know, the testimony that we heard was the Sainsbury's
5 victim, or the Royal Mail victim. So the defense's position
6 is well that even -- even that testimony doesn't prove
7 anything about what the AXA conduct did, the effect that the
8 AXA conduct had on State Street.

9 Obviously our position is that, based on the case
10 law, it is an increased or new risk of loss. So it doesn't
11 have to be actual loss. So showing that the same type of
12 conduct, occurring at the exact same time --

13 THE COURT: So the one piece of evidence that you
14 have is that these victims of a Count 1 conspiracy described
15 that the -- learning about the conduct at issue in the case
16 caused them to blacklist State Street or not do business with
17 State Street, either specifically transition management, or
18 more generally with all their businesses. And that while
19 that wasn't AXA, that's of the piece and the jury could infer
20 that similar conduct could lead to a similar result. And so
21 one argument -- one set of evidence that you have is that.

22 MR. JOHNSTON: That's one set.

23 THE COURT: Okay. And then the second set of
24 evidence is whatever the -- whatever of that genre the AXA
25 witness said.

1 MR. JOHNSTON: Yes. So the AXA witness -- the
2 issue, right, is that -- you know, because the AXA fraud was
3 really just uncovered in the fall, the resolution of that
4 matter has not happened yet. There's still ongoing
5 negotiations between State Street and AXA as to what
6 resolution will be because of that and so -- and we're not
7 going to elicit, well, what's the course of your negotiation,
8 right?

9 THE COURT: Sure.

10 MR. JOHNSTON: So we're sort of stuck between a
11 rock and a hard place.

12 THE COURT: So they're not going -- he's not going
13 to say we blacklisted them, because they haven't yet decided
14 whether to blacklist them.

15 MR. JOHNSTON: Right. And that --

16 THE COURT: Or that they paid us a certain amount
17 of money, or whatever, or that they paid a fine, a civil
18 fine, State Street, as a result of AXA, because that's still
19 being worked out.

20 MR. JOHNSTON: Right. It's still being worked out.
21 You know, the -- the defense sort of wants it where well, we
22 can't elicit that fine -- well, a fine hasn't been paid, so
23 obviously we can't elicit that. Well -- and the fine would
24 pay for the first, Count 1 through Count 5, so we can't
25 elicit that. You know, we can't elicit anything to make --

1 to actually meet our burden.

2 THE COURT: Actually, Mr. Weinberg, you just
3 expressed exactly. His view is that you should have done it
4 already. Grievous error has been committed day after day by
5 me allowing you to present all this evidence and if I had
6 just eliminated all the evidence, the trial would have been
7 faster, and it would have been fair.

8 MR. WEINBERG: And ironically, the very evidence
9 that Your Honor did admit is within the monetary -- is
10 consistent with what the Government now wants, which is a
11 deferred prosecution and a fine paid for the Sainsbury's,
12 paid for the Royal Mails. They have that evidence, over our
13 objection, to argue that the bank was at risk. You heard
14 Dean Johnson, without dispute, say that they were blacklisted
15 and you heard these witnesses say that monies were paid.
16 They have that. We're not going to dispute that. It's not
17 disputed.

18 But I'd like to just make a record, Judge, that,
19 one, we, dispute the case law that the Government correctly
20 cites and it's not a lot of case law that I can cite, the
21 idea that State Street signs an agreement and ends up, you
22 know, reporting itself. And you know, was charged here as a
23 co-conspirator, that they're also alleged to be the financial
24 institution that is harmed for purposes of bank fraud
25 jurisdiction, you know, we disagree with and we object to. I

1 understand the case law is --

2 THE COURT: Pause here. I'm going to -- I will
3 hear both of you more with respect to this and the other
4 evidentiary issues that relate to Monday, so we can --
5 because I can see how it would be helpful to all of you if I
6 resolve them today, so I'll do that, but I don't want to
7 delay waiting the jury.

8 Just one last question for Mr. Johnston. So what
9 you want to add, what you basically have is the victims from
10 Europe who have said -- that interfered with our -- we
11 changed the amount of business we did with State Street. We
12 eliminated it, we blacklisted them, we stopped working with
13 them, whatever -- however the different ways they put it.
14 That's one set.

15 What you want to admit, through the State Street
16 witness, is, (a), as a result of the Count 1 conspiracy, we
17 entered into a deferred prosecution agreement, not the
18 agreement itself, but the fact that they entered into an
19 agreement. Two, you want to admit that a deferred
20 prosecution agreement required us, when we learned of the AXA
21 issue, to investigate it and report it. And that cost us
22 money to investigate it and report it.

23 And three, that -- was three you wanted to admit
24 the fine, or not?

25 MR. JOHNSTON: No, we don't necessarily need to

1 admit the fine. What we do want --

2 THE COURT: It's yes or no, whether you're asking
3 for it or not.

4 MR. JOHNSTON: We want a --

5 MR. FRANK: Remember, you --

6 THE COURT: This is just one more example, in that
7 long-simmering issue that has pervaded American history since
8 like the passage of the constitution, which is who is in
9 charge. This is the moment, is it Washington, or is it
10 Boston, and I'll let you two work that out.

11 MR. FRANK: Let me just say I'm very uncomfortable
12 advocating a states' rights position here, but --

13 THE COURT: Maria, go get the jury.

14 MR. WEINBERG: Judge, we of course think that any
15 evidence that suggests that State Street believed this to be
16 a fraud, admitted this to be a fraud, you know, is akin to
17 testimony that a co-conspirator pled guilty or conclusions.

18 MR. FRANK: And that's not what we're asking for,
19 to be clear, Your Honor. We don't have to call it a deferred
20 prosecution agreement. We can call it an agreement. We
21 don't have to call it criminal money penalty, we can call it
22 a fine or a penalty, but the magnitude is relevant.

23 THE COURT: Right.

24 MR. WEINBERG: The magnitude is not relevant. It's
25 the risk of having to pay money that is the element.

1 MR. FRANK: If I could finish --

2 THE COURT: We'll talk more about it at 1:00 or at
3 11:00.

4 Mr. Frank, you should have a fuller view of the
5 state's rights position. It was justice Brandeis, himself,
6 who was a major proponent of states' rights.

7 (The jury enters the courtroom.)

8 THE COURT: Good morning, ladies and gentlemen of
9 the jury. Nobody did any independent research, discussed the
10 case, or anything of that nature? Good. All right. So I
11 thank you for accommodating me in that I had a
12 judicial education conference, as I explained to one of your
13 number -- one or two I ran into in the cafeteria this
14 morning, that it was a conference both which I was speaking
15 at and being educated at.

16 So hopefully now I'm wiser, smarter, and better.
17 And you will see, you will be the judge. Like you're the
18 judge of this case, you too, at the end, I'll ask you whether
19 you think, well, afterwards, was I better or not, and I can
20 report it back to the conference organizer as to -- at the
21 court, as to whether it really helped or not. So you could
22 think about that. You won't be getting any jury instructions
23 on that, but you're certainly free to comment at the end of
24 the case about that.

25 All right, so we're ready to resume with the next

1 witness for the Government.

2 MR. JOHNSTON: Yes, Your Honor. The Government
3 calls James Kelly to the stand.

4 THE COURT: And I will, ladies and gentlemen,
5 before you go home today at 1 o'clock, I will update you on
6 the schedule for where we are in the rest of the case.

7 (The witness was duly sworn.)

8 THE COURT: Please be seated.

9 Go ahead.

10 **JAMES KELLY**

11 having been duly sworn, testified as follows:

12 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

13 BY MR. JOHNSTON:

14 **Q.** Good morning, Mr. Kelly.

15 **A.** Good morning. Can everybody hear me okay?

16 THE COURT: Yes.

17 **Q.** Where do you live?

18 **A.** I live in New Providence, New Jersey.

19 **Q.** How old are you?

20 **A.** I'm 49 years old.

21 **Q.** Where do you work?

22 **A.** I work at AXA Equitable Life Insurance Company.

23 **Q.** What kind of company is AXA Equitable?

24 **A.** AXA Equitable is a life insurance company that is in the
25 business of offering retirement products, investment

1 products, and life insurance.

2 **Q.** Do you work within a particular business unit at AXA
3 Equitable?

4 **A.** I work within the Funds Management Group. FMG, we call
5 it.

6 **Q.** What does FMG do?

7 **A.** We are the investment advisor and also the administrator
8 for the mutual funds that support our investment insurance
9 products.

10 **Q.** What are mutual funds?

11 **A.** So a mutual fund is an investment company that holds
12 securities; stocks, bonds. A mutual fund is a legal entity
13 that has no employees, so it needs to contract out with an
14 investment and an administrator to run its operations.

15 **Q.** So what you're saying is a mutual fund is a separate
16 legal entity?

17 **A.** It's a separate legal entity, yes.

18 **Q.** And how is it organized?

19 **A.** It's a '40 Act company.

20 **Q.** Is it a trust?

21 **A.** The mutual funds are in a trust, yes.

22 **Q.** You say that the trust doesn't actually have any
23 employees?

24 **A.** It does not.

25 **Q.** So what role, then, does AXA Equitable play with respect

1 to these funds?

2 **A.** So AXA Equitable is the investment and the administrator.
3 And myself and members of the funds management group, we are
4 officers on the funds. I'm the controller.

5 **Q.** What does it mean to be a controller?

6 **A.** So some of my day-to-day responsibilities include
7 financial reporting for the mutual funds, accounting-type
8 work operations, tax. And from time to time, I also work on
9 transitions.

10 **Q.** How long have you worked at AXA Equitable?

11 **A.** 12 years.

12 **Q.** How long have you worked in the role of being a fund
13 administrator and advisor?

14 **A.** About 20 years.

15 **Q.** Where did you go to school?

16 **A.** I went to school at Monmouth College.

17 **Q.** What did you study?

18 **A.** Finance.

19 **Q.** You testified that part of your job is to hire transition
20 managers?

21 **A.** Yes.

22 **Q.** What sort of service providers do the funds -- or do the
23 managers need to hire on behalf of the funds?

24 **A.** Custodian service, transition manager, subadvisors.

25 Those were all service providers that the investment advisor

1 needs to contract out with.

2 **Q.** Who were the ultimate investors in these funds that you
3 helped manage?

4 **A.** So the ultimate investors are the people that buy certain
5 insurance products in AXA Equitable. In a legal sense, AXA
6 Equitable owns the funds, but the peoples that buy the
7 certain insurance products, the performance of their
8 insurance products is driven by the underlying mutual funds.
9 So if our mutual funds perform strongly, certain of these
10 insurance products will also perform strongly.

11 **Q.** What is AXA's responsibility to these mutual funds?

12 **A.** We have a fiduciary responsibility to the funds.

13 **Q.** What does it mean to have a fiduciary responsibility, in
14 your understanding?

15 **A.** My understanding is we need to put the interests of the
16 funds' before our own.

17 **Q.** Do you have any individual responsibility toward the
18 funds?

19 **A.** I have a fiduciary responsibility, myself, to the funds.

20 **Q.** And why do you individually have such a responsibility?

21 **A.** I am an officer of the funds.

22 **Q.** What, if any, does this responsibility have on your
23 approach to costs?

24 **A.** We would look to minimize costs, where possible, because
25 that will increase the performance of our funds.

1 **Q.** Do these funds ever have occasion to hire a transition
2 manager?

3 **A.** Yes, they do. For example, there's times where a
4 portfolio manager needs to be replaced, or maybe a fund is
5 changing an investment strategy. And that would require a
6 mutual fund to do a large amount of buying or selling, kind
7 of changing the makeup or changing the composition of what
8 the funds hold.

9 **Q.** Why would you need a transition manager to do that for
10 you?

11 **A.** Because FMG does not -- the funds management group does
12 not have its own brokerage operations, so we would need to
13 contract out with a transition manager.

14 **Q.** Directing your attention to early 2011, did a number of
15 AXA funds undergo a transition?

16 **A.** Yes.

17 **Q.** Which funds were these?

18 **A.** EQ/Core Bond, multi-sector portfolio -- Multi-Manager
19 Multi-Sector Portfolio, Multi-Manager Core Bond.

20 **Q.** And what types of -- so are these three different mutual
21 funds?

22 **A.** Three different mutual funds, yes.

23 **Q.** And what types of assets were in these mutual funds?

24 **A.** Fixed income bonds.

25 **Q.** Just bonds?

1 **A.** Primarily bonds.

2 **Q.** How large were these three funds put together?

3 **A.** Billions of dollars.

4 **Q.** What was your -- your personal role with respect to these
5 three funds that were undergoing a transition?

6 **A.** So I was part of a group within the funds management
7 group that had the responsibility of selecting a -- selecting
8 a transition manager and also supervising the transition
9 manager throughout the whole process.

10 **Q.** In general, how does the group that you're a part of go
11 about the process of selecting a transition manager?

12 **A.** So first we -- our goal is to prequalify a number of
13 transition managers through a due diligence questionnaire.
14 And this due diligence questionnaire is about a 30- to
15 40-page document, with a whole host of questions for
16 transition managers, because we want to know all aspects of a
17 transition manager's capabilities and their operations before
18 we would even start dealing with them. That's the first
19 step.

20 **Q.** So you send these questionnaires to the -- to various
21 transition managers?

22 **A.** We do and the transition managers would fill them out and
23 then we would receive them back. And a number of us within
24 the funds management group would then review the question --
25 review the answers that the transition manager inserted.

1 **Q.** If you were satisfied with the answers in the
2 questionnaire, what would -- what happens then?

3 **A.** The next step is to typically set up an onsite due
4 diligence visit with the transition manager and, you know, to
5 further meet face to face, ask more questions, tour their
6 trading floor.

7 **Q.** And then if you're satisfied with what you see in person,
8 what's the next step?

9 **A.** The next step is typically we would put them, what we
10 call, on our bench, and have them available to send proposals
11 to.

12 **Q.** At any given time, how many transitions managers would be
13 on AXA's bench?

14 **A.** Three to four.

15 **Q.** I'd like to show you, for the witness only, a document
16 that's been marked as Government Exhibit 4.

17 MR. JOHNSTON: Bear with me for a second. My
18 monitor is not working.

19 THE COURT: You can't see it on the monitor?

20 THE WITNESS: No.

21 THE COURT: Maria?

22 It's not on yours, either, Mr. Johnston?

23 MR. JOHNSTON: No.

24 THE COURT: It's on mine.

25 THE DEPUTY CLERK: I'm not sure.

1 MR. JOHNSTON: Well, can the witness see it?

2 THE COURT: He cannot.

3 Maria, go check.

4 MS. LEAHY: We can give him a hard copy.

5 THE COURT: In the meantime, do you have a hard
6 copy you can give him?

7 MS. LEAHY: Yeah.

8 MR. JOHNSTON: Could you actually just give him all
9 the binders?

10 MS. LEAHY: You don't want to use the ELMO?

11 MR. JOHNSTON: For the witness, we'll need all of
12 them.

13 MR. WEINBERG: Judge, since there's an evidentiary
14 objection to this object, can we approach the bench while the
15 Government is coordinating?

16 THE COURT: Sure.

17 (The following discussion held at the bench.)

18 MR. WEINBERG: If I understand directly, the
19 Government is offering a 40- or 50-page questionnaire and
20 that is dated September of 2009, prepared by persons other
21 than Mr. McLellan and we, therefore, object.

22 THE COURT: So can I just see it?

23 MR. GOLDSTEIN: Sure.

24 THE COURT: Is this basically -- this is the
25 questionnaire that we talked about?

1 MR. JOHNSTON: Yes. And at the time this was
2 submitted, Mr. McLellan was the business head of the unit.
3 So we're not saying that he personally wrote this, but this
4 shows the representations that his business --

5 THE COURT: What's the objection?

6 MR. WEINBERG: It's 18 months earlier. It's not
7 directly correlated to this transition and there will be no
8 other questionnaire or update to it. So we think it's not
9 relevant.

10 THE COURT: Overruled.

11 MR. WEINBERG: Thank you.

12 (Bench conference concluded.)

13 THE COURT: We're working on the monitors, but in
14 the meantime, does the witness have a paper copy of that
15 exhibit?

16 MR. JOHNSTON: Yes.

17 BY MR. JOHNSTON:

18 Q. Could you look at the one that starts with the range of 1
19 to 90?

20 THE COURT: So the binders have different ranges.
21 We want you to look at number 4.

22 MS. LEAHY: 104.

23 MR. JOHNSTON: Yeah 104 and we'll start on page 4.

24 THE COURT: Number 104 or number 4?

25 THE WITNESS: Tab 4, I have it.

1 THE COURT: So just so I'm clear, is it Exhibit 4?

2 MR. JOHNSTON: It's Exhibit 4.

3 THE COURT: All right.

4 BY MR. JOHNSTON:

5 Q. Do you recognize this document, Mr. Kelly?

6 A. Yes.

7 Q. What is it?

8 A. This is a due diligence questionnaire that was sent from
9 our compliance department within the funds management group
10 to State Street.

11 MR. JOHNSTON: Your Honor, at this time, the
12 Government moves to admit Exhibit 4 into evidence.

13 THE COURT: All right. It's allowed.

14 MR. JOHNSTON: Thank you, Your Honor. Permission
15 to publish to the jury. Let's see if that works.

16 THE COURT: We'll see if it works. Is it on your
17 monitors?

18 MR. JOHNSTON: It actually just popped up on mine,
19 too.

20 BY MR. JOHNSTON:

21 Q. Mr. Kelly, is your monitor working?

22 A. Well, I think my green light is off, I think.

23 Yes. Well, it's a little bit fuzzy.

24 THE COURT: Well, you'll have the paper copy. You
25 can always refer to that, if you prefer, if it's clearer.

1 Go ahead, Mr. Johnston.

2 BY MR. JOHNSTON:

3 **Q.** Mr. Kelly, is this one of the questionnaires that gets
4 sent out to transition managers you're seeking to put on your
5 bench?

6 **A.** Yes, it is.

7 **Q.** Let's take a look at page 4, please.

8 THE COURT: Maybe you could get the date, just
9 to --

10 MR. JOHNSTON: Sure.

11 BY MR. JOHNSTON:

12 **Q.** And then back to page 1, if you could look. What's the
13 date that was -- that this document was submitted?

14 **A.** September 3, 2009.

15 MR. JOHNSTON: Can we go to page 4, please. If we
16 could blow up where it says "Global Fixed Income."

17 BY MR. JOHNSTON:

18 **Q.** Mr. Kelly, what is your understanding of the phrase
19 "State Street is a lead agency fixed-income trading firm"?

20 **A.** That State Street would trade on an agency basis, meaning
21 that they would trade on behalf of their client, that they
22 would go out in the market and seek the best price possible.
23 That they would not trade out of their own inventory of
24 securities and that's potentially a conflict because they
25 could generate revenue other than the stated commission rate

1 that we pay them.

2 **Q.** What's your understanding of the term "best execution,"
3 which appears in the next sentence?

4 **A.** So best execution, my understanding it's a trading term,
5 and you would go out into the market and try and get the best
6 price possible for a given trade at the lowest possible cost.

7 MR. JOHNSTON: If we could take a look at page 8,
8 please, and if you can go in on the paragraph that
9 states "fiduciary responsibility."

10 BY MR. JOHNSTON:

11 **Q.** "State Street is willing to act as a fiduciary for the
12 portfolio for the entire transition period."

13 What is your understanding of what that term means?

14 **A.** That State Street would put the interest of our funds
15 ahead of their own, throughout the entire transition period,
16 starting with their responses in the due diligence
17 questionnaire, through the pre-trade analysis, through
18 trading, through post-trade reporting, just through the
19 entire process.

20 MR. JOHNSTON: And if we could go to page 13,
21 please. Go to the answer on number 13, please, Erin.

22 BY MR. JOHNSTON:

23 **Q.** So directing you attention to this question, where you've
24 requested a disclosure of relevant revenue. What's your
25 understanding of the answer, "State Street's sole source of

1 transition revenues is commissions, which are detailed in our
2 pre-trade analysis and agreed upon in each transition
3 notice"?

4 **A.** That State Street's sole source of revenue for
5 transitioning our portfolios would be from the stated
6 commission rate that was -- that was in the pre-trade
7 analysis. That would be their only source of revenue.

8 MR. JOHNSTON: And let's go to page 14, please, and
9 if we can blow up number 15.

10 BY MR. JOHNSTON:

11 **Q.** And directing your attention to where it says, under sub
12 question (a), "Our only remuneration commissions is paid
13 explicitly in commission fees, which are detailed in our pre-
14 and post-trade reports."

15 What's your understanding of what they're telling
16 you here?

17 **A.** That State Street's sole revenue source for transition of
18 trading in our portfolios would be from the stated commission
19 rate that was agreed upon in the pre-trade analysis.

20 MR. JOHNSTON: And now let's take a look at
21 page 45. If we can zoom in on the 2B1. Just this whole
22 text. That would be fine.

23 BY MR. JOHNSTON:

24 **Q.** Now, directing your attention to the answer at the bottom
25 of the screen, where it says "We do not markup trades."

1 What's your understanding of what State Street is
2 telling you here?

3 **A.** It's my understanding that the commission rate would be
4 the sole source of revenue and that there wouldn't -- there
5 wasn't going to be another source of revenue.

6 **Q.** All right. And let's go to page 12 briefly. If we can
7 zoom in on the organization chart at the top. What's your
8 understanding of who was the head of transition management
9 when AXA received this questionnaire?

10 **A.** Ross McLellan.

11 MR. JOHNSTON: Can you take this down?

12 BY MR. JOHNSTON:

13 **Q.** In early 2011, was State Street on AXA's bench?

14 **A.** Yes. They successfully made it through our due diligence
15 process and they were on our bench.

16 **Q.** Had you ever actually done a transition with them at that
17 point?

18 **A.** Not prior, no.

19 **Q.** So they had been on your bench for a little while?

20 **A.** I would estimate a year or two.

21 **Q.** Do you know why you hadn't chosen State Street up to that
22 point?

23 **A.** I don't have a specific memory. I -- my best memory is
24 that they just did not win a -- a bid. Maybe other
25 transitions managers beat them out.

1 **Q.** Now, in the 2011 time period, where these three mutual
2 funds that you testified about, were looking to go through a
3 transition, which transition managers did you reach out to to
4 request proposals from?

5 **A.** We requested proposals from State Street, BlackRock, JP
6 Morgan, and BNY ConvergeEx.

7 **Q.** Did you receive responses from all of those?

8 **A.** Yes, we did.

9 **Q.** Let's take a look at -- actually, before we go and look
10 at it, how, in general, do you go about reviewing and
11 analyzing the proposals that you receive from transition
12 managers?

13 **A.** So it's a collaborative effort within the funds
14 management group. It's not just one person that's going to
15 make a decision. We have members from compliance, investment
16 services, fund administration, my department. The whole
17 group of us will collaborate and look at all the pre-trade
18 analyses and determine which transition manager that we would
19 give a transition to.

20 **Q.** Are you familiar with a concept called implementation
21 shortfall?

22 **A.** Yes.

23 **Q.** What is an implementation shortfall?

24 **A.** The implementation shortfall is the total cost of buying
25 and selling securities. It has explicit costs or direct

1 costs like a commission rate, but it also has indirect costs
2 that are not known until a security trades, but they can be
3 estimated.

4 **Q.** Which parts of the implementation shortfall can be known
5 in advance?

6 **A.** The commission rate.

7 **Q.** Which parts are estimates?

8 **A.** Opportunity costs, market impact, spread costs.

9 **Q.** What -- how important, if any, is the commission cost in
10 your decision to hire a transition manager?

11 **A.** It is significant, because it's a known cost, before you
12 start trading.

13 MR. JOHNSTON: And now I want to show you a
14 document, for the witness only, Exhibit 95.

15 THE COURT: Can you see it?

16 THE WITNESS: If you can blow it up. That's fine.

17 BY MR. JOHNSTON:

18 **Q.** Mr. Kelly, do you recognize this document?

19 **A.** Yes.

20 **Q.** What is it?

21 **A.** This is an e-mail from myself to State Street, Ross
22 McLellan, and Kevin Walker. And I am sending them compliance
23 certification to fill out. Also, I am sending them
24 materials, such as the model portfolio and our current
25 portfolios, so that they can complete a pre-trade analysis.

1 **Q.** Mr. Kelly, is this e-mail that you're looking at just
2 part of an earlier e-mail in a longer chain?

3 MR. JOHNSTON: You can zoom out, Erin, and show him
4 the top.

5 THE WITNESS: Yes.

6 BY MR. JOHNSTON:

7 **Q.** Your Honor, at this time the Government moves to admit
8 Exhibit 95 and its attachment, 95.1?

9 MR. WEINBERG: No objection.

10 THE COURT: Admitted.

11 MR. JOHNSTON: Publish to the jury, please.

12 THE COURT: Yes.

13 (Exhibit Nos. 95 and 95.1 admitted into evidence.)

14 MR. JOHNSTON: Let's zoom back in at the bottom,
15 please.

16 BY MR. JOHNSTON:

17 **Q.** Mr. Kelly, what documents are you sending to Mr. McLellan
18 and Mr. Walker?

19 **A.** Compliance certification, the model portfolio, and our
20 current holdings. They need these -- they need the model
21 portfolio and the current portfolio to complete their cost
22 estimate or pre-trade analysis.

23 **Q.** What stage in the selection process are you at when
24 you're sending this e-mail to Mr. McLellan and Mr. Walker?

25 **A.** This would be after we've chosen State Street as a

1 transition manager for this project.

2 **Q.** After you've -- have you received a proposal from them
3 yet?

4 **A.** Actually, this is -- I'm sorry; I said after. Prior
5 to -- this is -- this is part of -- this is part of the --
6 what we would send out to each transition manager, for them
7 to complete a pre-trade analysis. Then we would receive all
8 of the pre-trade analyses back from all of the transition
9 managers.

10 **Q.** So at this point, you're just reaching out to State
11 Street to ask for a proposal?

12 **A.** Correct.

13 **Q.** And is this the info that they need to give you a
14 proposal?

15 **A.** It is.

16 **Q.** And then when you say, "Pre-Trade analysis is due back to
17 us by tomorrow end of day."

18 What are you telling them there?

19 **A.** I'm telling them -- I'm asking them to complete a cost
20 estimate or a pre-trade analysis and to have it back to us by
21 tomorrow, end of day.

22 **Q.** And when you say, in the very first line, "as discussed,
23 please see attached files," what's your understanding of
24 whether you had a conversation with Mr. McLellan?

25 **A.** So my understanding is that I would have -- I would have

1 called Ross and just given him a heads-up that these
2 documents were coming over, so he could look out for it in
3 his e-mail.

4 **Q.** Let's take a look at the response up top, please. Did he
5 send you a document back --

6 **A.** Yes.

7 **Q.** -- Mr. McLellan?

8 MR. JOHNSTON: Let's take a look at the attachment,
9 please. 95.1. Let's zoom in.

10 BY MR. JOHNSTON:

11 **Q.** What document are we looking at, Mr. Kelly?

12 **A.** This is a compliance certification that I'd have --

13 **Q.** What's the purpose?

14 **A.** Just to have the -- each transition manager certify to us
15 certain things that, for example, that they will report any
16 trade errors. We just want to be comfortable with the
17 compliance culture of the transition manager.

18 **Q.** Who signed this one behalf of State Street?

19 **A.** Ross McLellan.

20 MR. JOHNSTON: We can take this down, Erin.

21 And I want to show a document for the witness only,
22 Exhibit 101.

23 BY MR. JOHNSTON:

24 **Q.** Do you recognize this document, Mr. Kelly?

25 **A.** Yes.

1 Q. What is it?

2 A. This is a document from State Street and it includes the
3 pre-trade analyses.

4 Q. And is this date one day after that prior e-mail we
5 looked at?

6 A. I didn't notice the date on the prior e-mail.

7 Q. What's the date that you see on this e-mail?

8 A. February 24th.

9 MR. JOHNSTON: Your Honor, at this time the
10 Government moves to admit Exhibit 101, with its attachments,
11 101.1, 101.2, 101.3, and 101.4.

12 MR. WEINBERG: No objection.

13 THE COURT: Admitted.

14 (Exhibit Nos. 101, 101.1, 101.2, 101.3, and 101.4
15 admitted into evidence.)

16 MR. JOHNSTON: If we can publish to the jury,
17 please.

18 THE COURT: I did.

19 BY MR. JOHNSTON:

20 Q. Who sent you the pre-trade back?

21 A. Kevin Walker.

22 Q. And why are there four different attachments to this
23 e-mail?

24 A. There is -- three attachments are for each fund in the
25 transition and then they also -- State Street also sent a

1 strategy document, transition management strategy document.

2 **Q.** Did you review the pre-trade analysis after receiving it
3 from State Street?

4 **A.** I reviewed it and a number of my colleagues reviewed it.

5 **Q.** Let's take a look at 101.1, please. What's this
6 particular document that we're looking at?

7 **A.** That is the transition strategy analysis that State
8 Street sent to AXA.

9 MR. JOHNSTON: Let's take a look at page 5 of this
10 document. We can zoom in on the graphic at the bottom.

11 BY MR. JOHNSTON:

12 **Q.** Directing your attention to the phrase at the bottom of
13 the right-hand corner of this wheel, where it says "fully
14 dedicated global agency trading desk."

15 What's your understanding of what that phrase
16 means?

17 **A.** That State Street would trade on an agency basis for our
18 trades, meaning they would not trade out of the inventory of
19 their own securities, to potentially generate another source
20 of revenue for themselves. That they would go out in the
21 market, as our agent, and try and obtain the best price
22 possible for our funds.

23 **Q.** And then where it says "fiduciary relationship." Do you
24 have an understanding of that phrase that differs from what
25 we saw in the questionnaire?

1 **A.** No, it doesn't differ. State Street is representing that
2 they would be a fiduciary for our funds and put the interests
3 of our funds ahead of their own.

4 **Q.** Let's take a look at page 9, please. If we can zoom in
5 at the top.

6 Directing your attention to the top of that
7 paragraph where it says, "State Street's transition
8 management business model is built around complete
9 transparency to clients in relation to all elements of
10 transaction cost and performance. State Street's goal in
11 transitioning fixed income assets is to maximize the value of
12 the transition portfolio by eliminating the hidden costs and
13 conflicts of interest that exist within the fixed income
14 market."

15 What's your understanding of what State Street is
16 telling you in this part of their proposal?

17 **A.** Okay. So for the first sentence, that State Street is
18 going to be completely transparent to us, as a client,
19 through the whole transition management process. They're
20 going to be transparent and honest about their answers in the
21 due diligence questionnaire. They're going to be honest and
22 transparent about the pre-trade analysis that they sent us,
23 the bid, through trading, and through the post-trade
24 reporting.

25 **Q.** Let's take a look at paragraph 2, briefly.

1 Directing your attention to the first two
2 sentences, where it says "State Street does not charge an
3 explicit management or project management fee for transition
4 assignments. State Street does not take a spread on any
5 transactions, nor do we let any counterparty take a spread on
6 our clients' transactions."

7 What is your understanding of what State Street is
8 telling you here?

9 **A.** I understand this to mean that State Street's sole source
10 of revenue, that they represented multiple times, would just
11 be form the commission rate that's charged to our trades at
12 the time of execution.

13 **Q.** Let's take a look at page 6, please.

14 Now, you testified that there were three different
15 bond portfolios that were going to be transitioned?

16 **A.** Yes.

17 **Q.** What are we looking at here on this page?

18 **A.** This is part of a pre-trade analysis that was sent from
19 State Street and it details out the costs of the transition.

20 **Q.** And is this for all three portfolios or just for one of
21 the portfolios?

22 **A.** Just for one portfolio, the Multi-Sector Bond Portfolio.

23 **Q.** All right. And let's take a look at where
24 the "commission" line is. What's your understanding of
25 what's being represented to you here?

1 **A.** That State Street would charge .57 basis points and that
2 the estimated dollar amount of applying that rate to our
3 trades would be \$95,000.

4 **Q.** So of these two numbers, the basis point number and the
5 absolute dollar number, which one, if any, is, in your mind,
6 approximate?

7 **A.** The approximate is the dollar amount. The basis point
8 number, that's a fixed rate.

9 **Q.** Why is the dollar amount approximate, in your
10 understanding?

11 **A.** Yeah, the dollar amount is approximate, because the
12 trades are going to take place sometime in the future, maybe
13 four or five, six business days down the road and we won't
14 know exactly, because of market volatility, what the prices
15 of those securities that are going to be bought and sold. So
16 the dollar amount can fluctuate.

17 **Q.** Can the rate fluctuate in your understanding?

18 **A.** The rate would not fluctuate from the final pre-trade
19 analysis, through trading. That's not acceptable.

20 **Q.** Let's take a look at page 7, please. What are we looking
21 at on this page?

22 **A.** Same document, but for a different fund. This is part of
23 the pre-trade analysis sent by State Street.

24 **Q.** And let's draw your attention to the commissions line.

25 What's the approximate dollar amount of commissions

1 that State Street says they will earn on -- for trading this
2 particular portfolio?

3 **A.** Approximately \$117,000.

4 **Q.** And you'll notice the -- on the right is the basis point
5 number, slightly above the prior one?

6 **A.** Yes.

7 **Q.** Do you -- is your understanding about which of these two
8 is approximate any different than for the prior fund?

9 **A.** No different. The basis point is fixed and the dollar
10 amount can fluctuate for the reason I mentioned.

11 **Q.** Let's take a look at page 8, please.

12 What are we looking at on this page?

13 **A.** Same document, but for another fund, part of a pre-trade
14 analysis.

15 **Q.** And is the -- in your understanding, the commission
16 information presented to you in any different way than in the
17 prior two funds?

18 **A.** No different.

19 **Q.** So looking at the approximate dollar amounts of
20 commissions for the three funds, this one is \$379,000 and we
21 saw that there were approximately 95, 117,000 of the prior
22 two. What was your understanding of the total amount of
23 commissions in the approximate range that State Street was
24 proposing to charge you for all three portfolios?

25 **A.** It was roughly \$590,000.

1 MR. JOHNSTON: You can take those down, Erin.

2 BY MR. JOHNSTON:

3 Q. Who did you end up choosing to select -- or to undertake
4 your transition?

5 A. We chose State Street.

6 Q. Why did you choose State Street?

7 A. Well, first, because they made it through our due
8 diligence process, the due diligence questionnaire and
9 follow-up questions. Also, they were the low cost provider.
10 They -- with the pre-trade analysis, their total costs were
11 estimated to be lower than the other transition managers.

12 Q. How did the commission figure that they quoted compare to
13 the commission figures quoted by the other transition
14 managers?

15 A. The commission rate was lower than other transition
16 managers.

17 Q. Did you personally make this decision, or was it a
18 collective one?

19 A. No, it was a collective decision with multiple --
20 multiple of my colleagues in the funds management group.

21 Q. Did there come a time when a contract was signed between
22 State Street and AXA for this transition?

23 A. It's our practice to have a contract executed with a
24 transition manager, before they start trading. We looked for
25 a contract and no contract has been found so far.

1 **Q.** So you're saying that you looked in AXA's records and you
2 can't find a contact between AXA and State Street with
3 respect to this transition?

4 **A.** We looked and we also contracted out with the technology
5 company to help us search for it, because we believed we had
6 a contract.

7 **Q.** But you haven't --

8 **A.** But one has not been found so far.

9 **Q.** Is it your ordinary practice to have a contract?

10 **A.** It is our ordinary practice.

11 **Q.** Did the transition go forward with State Street?

12 **A.** It did.

13 **Q.** Did there come a time, prior to the actual trading, where
14 a member of your staff had a question about principal trades?

15 **A.** Yes.

16 MR. JOHNSTON: All right. Let's take a look, for
17 the witness only, at Exhibit 208.

18 BY MR. JOHNSTON:

19 **Q.** Do you recognize this document, Mr. Kelly?

20 **A.** Yes.

21 **Q.** What is it?

22 **A.** This is an e-mail from Kevin Walker, to one of my
23 colleagues in the funds management group.

24 MR. JOHNSTON: Your Honor, at this time, the
25 Government moves to admit Exhibit 208.

1 MR. WEINBERG: No objection.

2 THE COURT: Admitted.

3 (Exhibit No. 208 admitted into evidence.)

4 BY MR. JOHNSTON:

5 Q. Let's take a look at the bottom e-mail first. Mr. Kelly,
6 who sent this e-mail to Carla Byer?

7 A. Kevin walker.

8 Q. Do you know who Kevin Walker is?

9 A. Yes, he worked in the transition management group at
10 State Street.

11 Q. Can you tell us who Carla Byer is?

12 A. One of my colleagues at the time in the fund
13 administration group in funds managements, FMG.

14 Q. And who are the three people who are copied on the bottom
15 e-mail?

16 A. Ross McLellan, Kevin Miller, and Peter Weiner.

17 Q. Directing your attention to where Mr. Walker says, "Per
18 our conversation, we do not have a principal book that we
19 trade against, nor are we compensated for flow on a quid pro
20 quo basis."

21 Do you have an understanding why -- why Ms. Byer
22 would be asking about principal trades?

23 A. We wanted to ensure that State Street would not be
24 trading out of their own inventory, because that would be a
25 conflict. They could possibly generate additional revenue

1 from our trades, other than the specified commission rate on
2 the pre-trade analysis.

3 **Q.** And then further on, where it says, "The booking
4 convention will be as riskless principal, which is standard
5 in the fixed income market, and will help avoid operational
6 errors."

7 Mr. Kelly, are you familiar with the term riskless
8 principal?

9 **A.** I am not familiar with it. It sounds to me like it had
10 something to do with how the trades were actually booked to
11 our funds, but I don't -- I don't have a great knowledge of
12 riskless principal, that term.

13 **Q.** And then further on, where it says, "All spreads and
14 commissions on trades for a transition assignment are fully
15 disclosed and agreed prior to the mandate."

16 What's your understanding of what Mr. Walker is
17 telling Ms. Byer there?

18 **A.** That the commission rate that would be on the final
19 pre-trade from State Street would be their sole source of
20 revenue for our transition and that would be fully disclosed.

21 **Q.** Did this e-mail alter, in any way, your prior
22 understanding of State Street's role, as you understood, from
23 the questionnaire and the pre-trade?

24 **A.** No, it was -- it was similar.

25 **Q.** Let's then go further up to Ms. Byer's forward. Who did

1 she -- Ms. Byer forward this e-mail to?

2 **A.** To my colleagues in the funds management group. There
3 are compliance colleagues there and fund administration
4 department folks.

5 **Q.** Do you have an understanding of why Ms. Byer would
6 forward this e-mail to the rest of you?

7 **A.** It just goes to it's an important e-mail and it should be
8 shared.

9 **Q.** Do you recall any specific conversation you had around
10 this e-mail?

11 **A.** Not specifically, no.

12 **Q.** Did you receive a final pre-trade, before the trading --
13 or -- started?

14 **A.** Yes, we did.

15 **Q.** Let's take a look, for the witness only, at Exhibit 119.
16 And what's the date on this e-mail?

17 **A.** March 7, 2011.

18 **Q.** Who is this e-mail from?

19 **A.** Kristen Morris.

20 **Q.** Are you one of the recipients on this e-mail?

21 **A.** Yes.

22 MR. JOHNSTON: Your Honor, at this time, the
23 Government moves to admit 119, along with its attachments,
24 119.1 and 119.2.

25 MR. WEINBERG: No objection.

1 THE COURT: Admitted.

2 (Exhibit Nos. 119, 119.1, and 119.2 admitted into
3 evidence.)

4 BY MR. JOHNSTON:

5 Q. Mr. Kelly, do you know who Kristen Morris is?

6 A. I'm assuming she worked in the transition group at State
7 Street.

8 Q. Who are all these individuals on the Copy line?

9 A. I'm seeing members of Funds Management Group and also
10 members of State Street.

11 Q. What's your understanding of what is being sent to you,
12 as an attachment to this e-mail?

13 A. A revised pre-trade analyses for two of our funds.

14 Q. Why, in general, would you receive a revised pre-trade,
15 if you already had an original pre-trade?

16 A. Well, it's not uncommon for a transition manager to send
17 the final pre-trade. You know, as the time to trading gets
18 closer, they may want to refine their estimate of the
19 indirect costs, because it's actually closer to trading and
20 they can give a slightly more accurate number for what they
21 estimate for indirect costs.

22 Q. Okay. And I want to direct your attention to the body of
23 the e-mail, where Ms. Morris says, "The inkinds have gone up
24 in both cases."

25 What's your understanding as to what that sentence

1 means?

2 **A.** So I take that to mean -- so inkinds are securities that
3 don't need to be traded, that they're suitable for the legacy
4 portfolio and also the new portfolio, so no trading needs to
5 be done.

6 **Q.** What effect, if any, does an increase in inkinds have on
7 the commissions that would be charged?

8 **A.** Well, it would lower the dollar amount of commissions,
9 because less trades need to happen.

10 **Q.** Let's take a look at one of the attachments, 119.1,
11 page 2.

12 Is this a revised pre-trade for one of those three
13 funds?

14 **A.** It is.

15 **Q.** Directing your attention to the commission line. Has the
16 commission line for this particular fund, has the numbers
17 gone up or gone down from the first pre-trade that you
18 received?

19 **A.** It's gone down, both the basis points and the dollar
20 amount.

21 **Q.** What's your understanding of why the basis point rate
22 would decrease?

23 **A.** So it's my best memory that State Street had additional
24 time to analyze the portfolio and they identified additional
25 securities that didn't need to trade and that created

1 efficiencies. So they could pass along those efficiencies to
2 the funds, via a lower commission rate.

3 **Q.** Did that surprise you that they would lower the rate
4 before the trading?

5 **A.** No, because through the whole process, due diligence
6 process, you know, they said numerous times that they would
7 be a fiduciary to our funds, and put the interest of our
8 funds first, so it wouldn't surprise me to see them find
9 efficiencies and pass that along to our funds.

10 **Q.** Let's take a look at Exhibit 119.2. Page 2.

11 Are we looking at another -- or a revised pre-trade
12 for a second fund?

13 **A.** Yes.

14 **Q.** And directing your attention to the Commission line,
15 has -- have the numbers gone up or down, compared to the
16 first pre-trade?

17 **A.** Also down.

18 MR. JOHNSTON: All right. And let's take a look at
19 a document for the witness only, 121?

20 BY MR. JOHNSTON:

21 **Q.** Do you recognize this e-mail, Mr. Kelly?

22 **A.** Yes. It's a -- State Street is sending us the third
23 finalized pre-trade analysis.

24 **Q.** So for the third fund?

25 **A.** For the third fund.

1 **Q.** What's the date on this e-mail?

2 **A.** March 7, 2011.

3 MR. JOHNSTON: Your Honor, at this time, the
4 Government moves to admit Exhibit 121 into evidence and also
5 its attachments 121.1, and 121.2.

6 MR. WEINBERG: No objection.

7 THE COURT: Admitted.

8 (Exhibit Nos. 121 and 121.1 and 121.2 admitted into
9 evidence.)

10 BY MR. JOHNSTON:

11 **Q.** Who has sent you this e-mail, as well?

12 **A.** Kristen Morris.

13 **Q.** Let's take a look at the attachment 121.2, page 2.

14 Did you -- is this e-mail -- was this sent on the
15 same day as the other revised pre-trade analyses?

16 **A.** Yeah.

17 **Q.** Okay. Let's take a look at the commission line here.
18 And for this one, has the commission numbers gone up or down?

19 **A.** Down.

20 **Q.** So what was the -- you know, adding up the -- the
21 estimated commission numbers for each of the three
22 portfolios, what was the amount that you understood State
23 Street would be charging you for the transition for all three
24 funds?

25 **A.** Roughly \$433,000.

1 MR. JOHNSTON: You can take this down, Erin.

2 BY MR. JOHNSTON:

3 Q. Did the transition occur?

4 A. Yes, it did. State Street did trade our transition.

5 Q. Were you pleased with the results?

6 A. The results were in line with the pre-trade analysis, but
7 at the time, we didn't know that State Street had cheated our
8 funds of roughly \$800,000.

9 MR. WEINBERG: Objection. I move that the answer
10 be struck.

11 THE COURT: Sustained. Beyond the scope.
12 You're asking when -- later.

13 MR. JOHNSTON: Yeah, we'll ask about the --

14 THE COURT: Just the next questions.

15 So one question at a time, Mr. Kelly.

16 THE WITNESS: Okay.

17 THE COURT: So just the question that he asked just
18 with respect to that.

19 Why don't you ask him whatever your next question
20 is?

21 MR. JOHNSTON: Sure.

22 BY MR. JOHNSTON:

23 Q. Mr. Kelly, did -- do you prepare any checklist or
24 document after a transition occurs?

25 A. Yes.

1 **Q.** Is this type of checklist done in the ordinary course of
2 your business?

3 **A.** It is.

4 **Q.** Is it made by someone who has personal knowledge of the
5 matter?

6 **A.** It is.

7 MR. JOHNSTON: I want to show you Government
8 Exhibit 207, for the witness only.

9 BY MR. JOHNSTON:

10 **Q.** Do you recognize this document?

11 **A.** Yes, this is a transition management checklist that is
12 prepared by members of FMG and it's shared internally.

13 **Q.** Who prepared this particular one?

14 **A.** That is my handwriting. I prepared this document.

15 MR. JOHNSTON: Your Honor, at this time, the
16 Government moves to admit Exhibit 207.

17 MR. WEINBERG: No objection.

18 THE COURT: Admitted.

19 (Exhibit No. 207 admitted into evidence.)

20 MR. JOHNSTON: If we can take a look at page 5,
21 briefly. If we can zoom in on the signature and the date on
22 the bottom.

23 BY MR. JOHNSTON:

24 **Q.** Do you recognize the signature, Mr. Kelly?

25 **A.** That is my signature.

1 Q. And what date did you prepare this checklist?

2 A. April 5, 2011.

3 Q. And what did that day coincide with?

4 A. It coincided with the -- it was the time after trading
5 finished and the transition was completed.

6 Q. Let's take a look at page 1, please. If we can zoom in
7 at the top. Which portfolios have you listed there?

8 A. The Multi-Sector Bond, Multi-Sector Core Bond, and
9 EQ/Core Bond.

10 Q. So the three -- same three portfolios that you've been
11 testifying about?

12 A. Correct.

13 Q. And then the transition date, what dates do those
14 represent to you?

15 A. The dates that trading happened, from March 7, 2011, to
16 March 18, 2011.

17 Q. And which firms have you listed here as having submitted
18 bids to you?

19 A. BlackRock, JP Morgan, BNY ConvergeX, and State Street.

20 Q. And why is this a document that's prepared after
21 transition has occurred?

22 A. Well, this is just to make sure that, you know, our
23 normal course of business is followed. This checklist serves
24 as sort of a reminder for things -- for members of FMG to
25 think about during the transition.

1 **Q.** Let's take a look at page 2, please. And if we can zoom
2 in on question 2. Directing your attention to your -- the
3 yes box and the agreed upon cost, why did you fill it out the
4 way you did?

5 **A.** I filled it out the way I did, because in the pre-trade
6 analysis that State Street sent over, the commission rate was
7 disclosed, so I checked yes, and that the agreed-upon costs
8 of the commission rate were approximately .45 basis points.

9 **Q.** Now, and why did you -- why did you say it was
10 approximately .45 basis points?

11 **A.** Well, because there were three portfolios and, you know,
12 the stated commission rate differed a little bit. So in
13 hindsight, I should have listed out all three portfolios with
14 a specific commission rate for all three.

15 **Q.** But do you recall what the range was, just from the prior
16 documents we looked at?

17 **A.** I believe it was in between .45 and .40.

18 **Q.** Okay. So you actually picked the high one?

19 **A.** Yeah and that's why I put that squiggle line in the
20 beginning, meaning approximate.

21 **Q.** Let's take a look at the answer to question 6. Why did
22 you fill out this answer the way you did?

23 **A.** Because State Street represented that they would be
24 trading our securities on an agency basis, not doing
25 principal trades, meaning that they wouldn't trade out of

1 their own inventory of securities and possibly generate
2 revenue other than the stated commission rate.

3 MR. JOHNSTON: You can take this down, Erin.

4 BY MR. JOHNSTON:

5 Q. At some point, did you find out you had been charged more
6 than you had been expected?

7 A. Yes.

8 Q. And by how much did you find out you had been
9 overcharged?

10 A. Roughly \$800,000.

11 Q. Would that have been something you wanted to know prior
12 to selecting State Street as your transition manager?

13 A. Absolutely. It could have changed the outcome of the bid
14 process of selecting a transition manager.

15 Q. How so?

16 A. Well, State Street represented that they were going to
17 charge, in comparison, a low commission rate, when, in fact,
18 they did not. And, you know, it would have brought them
19 closer to other transition managers that we had a
20 relationship already, that we've used in the past, and were
21 comfortable with. And maybe we would have chosen another
22 transition manager.

23 Q. What was the total amount -- what's your understanding of
24 the total amount that State Street charged you?

25 MR. WEINBERG: I object, unless there's a basis for

1 the answer. In other words, unless there's an admissible
2 evidentiary basis.

3 MR. JOHNSTON: Can we have a -- can we have a
4 sidebar?

5 THE COURT: Well, one part's in the --

6 MR. WEINBERG: May we --

7 THE COURT: Well, actually, you haven't elicited
8 evidence from what they paid, just elicited evidence from the
9 pre-trade. Why don't you start with that?

10 MR. JOHNSTON: Well, I asked him how much he
11 believed he had paid.

12 MR. WEINBERG: Judge, this may be something to
13 raise at the sidebar. It is an evidentiary rule.

14 THE COURT: All right.

15 (The following discussion held at the bench.)

16 MR. WEINBERG: I ask what the expected source is of
17 his detailed information.

18 MR. JOHNSTON: Yeah. I mean, here's the thing, so
19 we can go into foundation.

20 MR. WEINBERG: I'm asking you --

21 MR. JOHNSTON: No, I get it. Obviously, there have
22 been discussions between State Street and AXA about the
23 amount of overcharges. State Street has disclosed to them
24 and said we have made 1.3 million. We understand that in the
25 original final pre-trade, 431,000. So his understanding as

1 to where the 1.3 million figure came from is, yes, through --

2 THE COURT: The 431,000 in commission was paid at
3 the time? It was paid at the time?

4 MR. JOHNSTON: We believed they were paid 431,000.

5 THE COURT: Management fee is in a separate check.

6 MR. JOHNSTON: Exactly.

7 THE COURT: So his basis of his understanding
8 was -- that there's more, the discovery of there's more came
9 from State Street.

10 MR. JOHNSTON: State Street disclosed it to AXA,
11 and said we charged you more than had been agreed upon in the
12 pre-trade and said we, in fact, made, on commissions
13 1.3 million, so if we want to go into foundation, then
14 it's --

15 MR. WEINBERG: I think once going into foundation,
16 it's hearsay.

17 MR. JOHNSTON: We can get into their -- their
18 way -- their negotiating a settlement.

19 MR. WEINBERG: It's still hearsay.

20 MR. JOHNSTON: No, it's not -- it wouldn't be. We
21 could get someone from State Street to be like we looked at
22 the books, we know exactly how much they charge. We've told
23 AXA that.

24 MR. WEINBERG: And then you would be in breach of
25 the agreement that we've been operating under, which is State

1 Street's --

2 MR. JOHNSTON: You can't have it both ways.

3 THE COURT: Of course I can.

4 MR. WEINBERG: The judge will decide about that.

5 THE COURT: So your agreements -- are your
6 agreements -- I'm not ruling on your agreements now. Okay.
7 I don't know what you all have agreed to or not agreed to and
8 you all make your own agreements based in light of what you
9 all know you have to do.

10 The question here is the only way he knows the
11 amount -- to the extent there was more charged, he knows how
12 much was negotiated, he's testified to all that. What he
13 understood the commission rate to be, he believes there's
14 more, because it was told to him by State Street, right?

15 MR. JOHNSTON: Yeah, via, counsel to counsel, and
16 then on down to him, yes.

17 MR. FRANK: Well, actually, there was a
18 Pricewaterhouse study that was used by State Street to
19 determine the precise amount and that's the basis for what
20 State Street told him. So he can testify that he understands
21 the Pricewaterhouse --

22 MR. WEINBERG: Which we've never seen.

23 MR. FRANK: Neither have we. It's not relevant.
24 The point is --

25 THE COURT: Has he read it?

1 MR. FRANK: I don't believe he has.

2 THE COURT: So Pricewaterhouse did the study.

3 MR. FRANK: Because there's no way for him to know,
4 because they're at Pricewaterhouse, Your Honor.

5 MR. JOHNSTON: And when you take about, hey, we've
6 had legal negotiations, they've offered to pay us back up to
7 1.3 million, plus all the interests, we can go into that.

8 MR. WEINBERG: It's not related to the -- first of
9 all, you have the contracted, now we want to go into the
10 details.

11 MR. JOHNSTON: No. It's actually just a kind of
12 looping question to be like, okay, you believe they were
13 charged over 800,000. What's your understanding as to what
14 you were going to pay. The 1.3 million, you take 800,000,
15 plus 434,000.

16 THE COURT: So wait.

17 MR. WEINBERG: They have the facts in. We didn't
18 object to the single question about his understanding that
19 they were overcharged 800 -- anything beyond this, Judge,
20 is -- or hearsay.

21 THE COURT: He did say that, right, that's what you
22 objected to, before, you came back around to that?

23 MR. FRANK: He said that was overcharged 800,000.
24 That's why I think it's kind of a silly objection. He's
25 overcharged 800,000. We're just trying to follow up: What's

1 the total amount you paid? 1.3 million.

2 THE COURT: So what do you want asked?

3 MR. JOHNSTON: I'm just going to ask, what's your
4 understanding of the total amount you paid.

5 MR. WEINBERG: And I object.

6 THE COURT: So you don't -- but you don't object to
7 the question regarding the 800,000?

8 MR. WEINBERG: I didn't object, thinking that there
9 was a basis of a particular person at State Street, but it's
10 now become apparent that Mr. Walker, for instance, didn't
11 give him a number, that it came from a circuitous source.

12 MR. FRANK: Mr. Walker lied to him about the
13 number. Do you want to get into that?

14 MR. WEINBERG: No.

15 MR. FRANK: So this is really -- this is --
16 surreal.

17 MR. JOHNSTON: We've been avoiding the discussions
18 between companies for the very reasons that you didn't want
19 us to elicit exactly how --

20 MR. WEINBERG: And I didn't object to the single
21 question they need to make their argument that AXA believed
22 they were overcharged. Anything beyond that is hearsay and
23 unnecessary.

24 MR. FRANK: We've done it on every single witness,
25 Judge. We've said what was the total amount you were

1 charged, what was the amount you expected to pay. I don't
2 understand the objection all of a sudden.

3 MR. WEINBERG: Because the other witnesses had
4 specific --

5 MR. FRANK: They had all representations from State
6 Street.

7 THE COURT: You can -- you can have one more
8 question. You have to -- you already have the question that
9 how much were you overcharged, they said 800,000, and then
10 you want to ask one more question, what was the total amount
11 that you believe you were charged. Over your objection, you
12 can have that question.

13 MR. GOLDSTEIN: Your Honor, may I be excused from
14 the courtroom for a few minutes?

15 THE COURT: Yes. Do you want me to tell the jury?

16 MR. GOLDSTEIN: No.

17 (Bench conference concluded.)

18 THE COURT: Go ahead.

19 BY MR. JOHNSTON:

20 **Q.** Mr. Kelly, what is your understanding of the total amount
21 that AXA paid to State Street for this transition?

22 **A.** The total amount was for roughly \$433,000.

23 **Q.** That was the amount that you believed you were going to
24 to be -- you were going to pay?

25 **A.** That was the --

1 THE COURT: This question is now, today, how much
2 do you believe your company paid -- has paid State Street for
3 this transition?

4 **A.** In commission -- in commission, it's over 1.2 million.

5 **Q.** What costs, if any, has AXA equitable incurred to date in
6 connection with these overcharges?

7 MR. WEINBERG: Objection.

8 THE COURT: Overruled.

9 THE WITNESS: We've incurred legal costs, lost
10 productivity. I should be at my desk doing my job for my
11 shareholders and also there's an ongoing risk and cost.
12 We're in the news, our funds, about being cheated.

13 MR. WEINBERG: I object, Your Honor, move to
14 strike.

15 THE COURT: Sustained as to that. Just as to that
16 word.

17 Ladies and gentlemen, that sort of borders into the
18 conclusion which is at issue in the trial, which is for you.

19 Go ahead.

20 THE WITNESS: Just the headline risk of our funds
21 and our company being in the newspaper. It might persuade
22 someone to not buy our products.

23 BY MR. JOHNSTON:

24 **Q.** What's been the amount of legal fees that AXA equitable
25 has expended so far --

1 MR. WEINBERG: Objection.

2 Q. -- in connection with these overcharges?

3 THE COURT: Do you pay -- I think you need a
4 foundation before anything, with respect to that.

5 BY MR. JOHNSTON:

6 Q. Sure. Have you participated in interviews with legal
7 counsel and discussion with legal counsel at AXA Equitable?

8 A. Yes.

9 Q. Do you have an understanding as to who has had to pay
10 legal costs in connection with investigating these
11 overcharges?

12 MR. WEINBERG: Objection. Hearsay.

13 THE COURT: Sustained as to the form of that
14 question.

15 BY MR. JOHNSTON:

16 Q. Do you have an understanding whether AXA equitable has
17 paid legal costs in connection with investigating the
18 overcharges?

19 MR. WEINBERG: Yes or no. I would ask that it be
20 limited to yes or no.

21 THE COURT: Yes or no.

22 THE WITNESS: Yes.

23 BY MR. JOHNSTON:

24 Q. What is the basis of your understanding?

25 A. That it is over \$100,000.

1 THE COURT: No, what is the basis for you knowing
2 that there has been legal costs. In other words, how do you
3 know that? Not what it is, but how do you know it?

4 THE WITNESS: I know it because I've met with
5 counsel, that they are charging, charging us for that.

6 BY MR. JOHNSTON:

7 Q. Do you know that -- has AXA Equitable hired outside
8 counsel?

9 A. Yes. That's what I meant. That I've sat with outside
10 counsel.

11 Q. Is that a free service?

12 A. It is not free.

13 Q. What's your understanding of the amount of fees --

14 MR. WEINBERG: Objection, hearsay.

15 BY MR. JOHNSTON:

16 Q. -- that you paid to -- that AXA has paid to outside
17 counsel?

18 THE COURT: How do you know? I think you need to
19 find out what's the basis for his understanding of the
20 amount.

21 MR. FRANK: Can we just have a moment, Your Honor?

22 THE COURT: Yes.

23 (Counsel confers.)

24 THE WITNESS: I have a basis --

25 THE COURT: He's going to ask you another question.

1 BY MR. JOHNSTON:

2 Q. Let me rephrase. Are you the controller of the three
3 funds that is the subject of the overcharges?

4 A. Yes.

5 Q. Is one of your -- what role, if any, do you have in
6 assessing and analyzing costs incurred by those funds?

7 A. Sometimes I oversee and I actually see the actual
8 invoices and I have seen invoices from outside counsel.

9 Q. And what types of amounts are we talking about?

10 MR. WEINBERG: Objection.

11 THE COURT: What's the objection now?

12 MR. WEINBERG: Hearsay and irrelevant.

13 THE COURT: Overruled.

14 THE WITNESS: I've seen invoices. My best estimate
15 is it's over \$100,000. And those are just the invoices from,
16 you know, awhile back. There's current legal costs, also,
17 that we haven't been billed for, yet.

18 BY MR. JOHNSTON:

19 Q. What harm, if any, can result to AXA Equitable, itself,
20 as a manager to the funds, as a result of losses to the fund?

21 MR. WEINBERG: Objection.

22 THE COURT: You mean -- I don't know what that
23 question means. Sustained.

24 BY MR. JOHNSTON:

25 Q. Are these funds a separate legal entity?

1 **A.** Yes.

2 **Q.** What role does AXA Equitable have with respect to these
3 funds?

4 MR. WEINBERG: I object. There's no basis for any
5 opinion.

6 MR. JOHNSTON: Your Honor, he's testified he was a
7 controller of these funds and an officer of the funds.

8 MR. WEINBERG: No, he testified that he was a
9 controller of -- investment manager for the funds.

10 THE WITNESS: No -- can I --

11 THE COURT: Actually, you can't. There will be
12 other questions. The hard part about being the witness,
13 Mr. Kelly, is you only get to answer the questions.

14 The question you want is what harm comes to AXA?

15 MR. JOHNSTON: Yes, because part of the testimony
16 has been that these funds are actually separate legal
17 entities, so we are asking questions about the connection.

18 THE COURT: Who paid the invoices?

19 MR. JOHNSTON: But this is a separate harm.

20 THE COURT: All right. You can answer that
21 question.

22 BY MR. JOHNSTON:

23 **Q.** Who paid the initial legal invoices?

24 **A.** AXA Equitable paid the initial legal invoices.

25 **Q.** Now, I want to ask you some questions about harm that

1 would result to AXA Equitable from losses to the fund. You
2 testified previously that AXA Equitable is a manager of the
3 fund?

4 **A.** Correct.

5 **Q.** What losses can AXA Equitable suffer, if the fund itself
6 suffers a loss?

7 MR. WEINBERG: Objection.

8 THE COURT: What do you mean by -- do you mean loss
9 -- what do you mean?

10 MR. JOHNSTON: Financial loss.

11 THE COURT: Overruled.

12 THE WITNESS: So the -- we have a board of
13 independent trustees that we need to report to.

14 BY MR. JOHNSTON:

15 **Q.** When you say "we," do you mean the funds have an
16 independent board of trustees?

17 **A.** Yes.

18 THE COURT: And the "we" is AXA? Who's the "we"?

19 THE WITNESS: The funds have a board of trustees,
20 independent board of trustees.

21 BY MR. JOHNSTON:

22 **Q.** And who hires, or who has the authority to hire or fire
23 the manager?

24 **A.** The board of trustees has the ability to fire us, if
25 we're not doing a good job.

1 **Q.** What role can -- if a loss is suffered by the fund, how
2 can that cause a loss in the manager?

3 MR. WEINBERG: Objection.

4 THE COURT: Overruled.

5 THE WITNESS: Can you repeat the question, please.

6 BY MR. JOHNSTON:

7 **Q.** Yes. If a loss is suffered by the fund, how can that
8 result as a loss to the manager?

9 **A.** So if a loss is suffered by the fund, our board of
10 trustees would look to the manager, AXA Equitable, to make
11 the fund whole.

12 **Q.** What do you mean make them whole?

13 **A.** Sorry. Meaning to compensate the fund by that loss, by
14 that dollar loss.

15 **Q.** Who has to -- so who would be making the payments back to
16 the fund?

17 MR. WEINBERG: This is speculative. I object, Your
18 Honor.

19 THE COURT: It's asked and answered. Sustained.
20 He just said.

21 BY MR. JOHNSTON:

22 **Q.** The manager?

23 THE COURT: He just said, you asked him the
24 question, he answered it. Next question.

25 BY MR. JOHNSTON:

1 **Q.** How is AXA Equitable compensated for its work as a
2 manager?

3 **A.** Through different fees, management fee, administration
4 fee.

5 **Q.** Do the management fees that AXA Equitable earns have any
6 relationship to the amount of funds under management?

7 **A.** Yes, it does. It's an asset-based fee. So as assets
8 rise, our management fee in dollars would rise.

9 **Q.** So then if a -- what, if any, effect could a loss of fund
10 have on the management fees that AXA Equitable could earn?

11 **A.** It would decrease our dollar amount of management fees.

12 **Q.** And from 2011, when this transition occurred, until 2017,
13 what's your understanding of the amount of fee -- or the
14 amount of funds that were not in the three funds that were
15 being managed by AXA Equitable?

16 MR. WEINBERG: I object.

17 THE COURT: Sustained. It's not a clear question.

18 BY MR. JOHNSTON:

19 **Q.** As a result of the overcharges, were those funds under
20 management, the 800,000 under management during -- from 2011
21 to 2017?

22 **A.** They were not.

23 **Q.** Was AXA Equitable earning fees on that 800,000 during
24 those six years?

25 **A.** No, but we should have.

1 MR. WEINBERG: I object. Move to strike.

2 THE COURT: Sustained as to the "should have."

3 MR. JOHNSTON: No further questions, Your Honor.

4 THE COURT: All right. Cross-examination.

5 MR. WEINBERG: Thank you, Your Honor.

6 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

7 BY MR. WEINBERG:

8 Q. Good morning. Very brief, Mr. Kelly. AXA is a huge,
9 international insurance company, is it not?

10 A. AXA is a large insurance company.

11 Q. It's centered in France, but it's got another huge
12 subsidiary in the United States, called AXA?

13 A. AXA Equitable Life Insurances, based out of New York
14 City.

15 Q. Sure. It's got billions of dollars of assets, does it
16 not?

17 A. Yes.

18 Q. And part of AXA Equitable New York is the subsidiary you
19 work for, which is called FMC, is that the right letters?

20 A. It's FMG, the funds management group.

21 Q. All right. And one of the functions of your group is to
22 manage mutual funds, correct?

23 A. Correct.

24 Q. That are -- largely consists of the dollars that have
25 been paid by annuity holders, et cetera, customers of AXA?

1 **A.** Customers of AXA.

2 **Q.** Who have an interest in whether or not the mutual funds
3 go up or down, correct?

4 **A.** Correct.

5 **Q.** And you do your best to manage them and have them go up
6 and beat the market, correct?

7 **A.** Yes.

8 **Q.** You show it. You have subadvisors, do you not, at times?

9 **A.** We have a number of subadvisors that we hire.

10 **Q.** Sure. And one of them was State Street Global Advisors,
11 correct?

12 **A.** Correct.

13 **Q.** And they assist you in making investment decisions and in
14 advising as to these huge mutual funds, correct?

15 **A.** They assist. We would set the investment strategy, but,
16 yes, they do assist with day -- with some day-to-day
17 responsibilities.

18 **Q.** In 2009, you received a question -- did you receive the
19 questionnaire or the response to a questionnaire from State
20 Street, correct?

21 **A.** From State Street Transition Manager, yes.

22 **Q.** Yes. And it was not until February of 2011 that State
23 Street was given a transition by AXA; is that correct?

24 **A.** In 2011, correct.

25 **Q.** This was a huge transition, was it not?

1 **A.** It was large, yes.

2 **Q.** How many billions?

3 **A.** Approximately 10 billion.

4 **Q.** And was there -- there was going to be trading from the
5 legacy from the mutual funds out of certain assets and then
6 the purchase of other assets, correct?

7 **A.** Correct. We wanted to change a benchmark in the funds,
8 so yes. A large amount of trading.

9 **Q.** Putting aside, if we can, the issue of the amount of
10 commissions. State Street went to the market, it sold the
11 securities, it bought the securities on behalf of the
12 shareholders of these mutual funds, correct?

13 **A.** Yes.

14 **Q.** In other words, it didn't go to some inventory and sell
15 its own bonds, to your knowledge, correct?

16 **A.** To my knowledge, no, they traded on an agency basis, to
17 my knowledge.

18 **Q.** Right. And again, an agency basis is to know you want to
19 sell certain securities, go out in the market on your behalf,
20 look at the potential buyers, pick the best buyer, often by
21 the lowest cost, and sell the asset on your behalf, correct?

22 **A.** Yeah. As an agent, we would look to State Street to
23 obtain the best possible price at the lowest cost.

24 **Q.** And they met the implementation shortfall, performed
25 well, putting aside, again, the issue of the commissions.

1 **A.** Well, the commissions are part of the implementation
2 shortfall, so I don't understand why it would be set aside.

3 **Q.** You did select State Street for a second transition, did
4 you not, in August of 2011?

5 **A.** The reason we selected them is because --

6 THE COURT: That's a yes or no question. Did you
7 or did you not select them in 2011?

8 THE WITNESS: Yes, we did.

9 BY MR. WEINBERG:

10 **Q.** The routine and practice at your investment advisor to
11 the mutual funds is when you do transitions is to enter
12 transition management agreements, correct?

13 **A.** It's our practice to have a transition management
14 agreement executed before trading starts. And we were
15 surprised that one -- that we could not find one for this
16 transition.

17 **Q.** Well, going back to February of 2011, do you have a
18 specific recollection today -- and I understand we're seven
19 years later -- at having negotiated a specific transition
20 management agreement?

21 **A.** That would not be my responsibility. That would be
22 others within the funds management group, in our legal
23 department, but I do not have a specific recollection of --
24 of negotiating a -- an agreement.

25 **Q.** AXA's got a huge IT section, it looked at its computers,

1 couldn't find a transition management for this \$10 billion
2 transition, correct?

3 **A.** We have looked and we could not find one.

4 **Q.** And you have not seen one from any other source, have
5 you? In other words, State Street has not provided you with
6 a transition management agreement, correct?

7 **A.** They have not.

8 **Q.** The US Government has not shown you a transition
9 management agreement?

10 **A.** No. But the source would either be from AXA or State
11 Street, not the Government.

12 **Q.** Right. You don't have one.

13 **A.** We -- I'm not sure -- you know, it may exist somewhere,
14 in a file. We don't know that.

15 **Q.** You've looked --

16 **A.** But as of today, there's no evidence, but it's our
17 practice to have one.

18 **Q.** But you can't testify there was one and that this wasn't
19 an aberration to your practice, correct?

20 **A.** I cannot testify that there is an agreement.

21 **Q.** And an agreement would --

22 **A.** Well, I'm sorry, a contract.

23 **Q.** Contract.

24 **A.** I mean -- yeah.

25 **Q.** So without beating up on this issue, I just want to go

1 back to an exhibit that the Government offered you and it's
2 Exhibit 4, which is going back to the questionnaire that
3 State Street responded to in September 3, 2009.

4 MR. WEINBERG: And Max, is it possible to get
5 page 8? The Fiduciary Responsibility paragraph.

6 BY MR. WEINBERG:

7 Q. Am I correct that the response was "State Street is
8 willing to act as a fiduciary for the portfolio for the
9 entire transition period, subject to the terms, conditions,
10 and limitations set forth in our transition services
11 agreement"?

12 A. I'm just reading that again, because it just popped up.

13 Q. Sure.

14 A. We had an agreement with State Street that the commission
15 rate on the pre-trade analysis would be the amount that would
16 be applied to our fund -- to our securities trades. We could
17 not find a contract, but we had an agreement.

18 Q. There was a contact, that would consist of the agreement,
19 would it not?

20 A. I'm not a lawyer. I don't know the specifics between an
21 agreement and a contract.

22 Q. You have transition agreements, do you not, that come
23 with contracts? You've seen them before, have you not?

24 A. We have -- we contract out with the transition manager.
25 That's our practice.

1 Q. And lawyers negotiate these agreements, and they become
2 part of the file for a transition, correct?

3 A. They negotiate the contract.

4 Q. Right. And that's what you've been looking for, but
5 can't find?

6 A. We cannot find the contract.

7 Q. We can go to page 13. These, again, are -- paragraph 13,
8 line 2.

9 "State Street's sole source of transition revenue
10 is commissions which are detailed in our pre-trade analysis
11 and agreed upon in each transition notice, delivered under
12 your transition agreement."

13 Here, in terms of the documents that you've
14 reviewed, you've reviewed pre-trade analysis, but not
15 contracts, not transition notices, and not transition
16 agreements, correct?

17 A. Repeat the question again, please.

18 Q. Right. You've had available to you and have reviewed
19 pre-trade analyses, correct?

20 A. Yes.

21 Q. But you've not had available to you and you've not seen
22 or reviewed a transition notice or a transition agreement.
23 That's what you've been looking for and can't find?

24 A. We cannot find the contract, correct.

25 Q. Ross McLellan, have you ever met him?

1 **A.** Not personally.

2 **Q.** Okay. You remember, based on an e-mail, a short
3 conversation on February 23rd, thereabouts, before the
4 awarding of the transition to AXA?

5 **A.** I don't have a specific memory of that, but the e-mail
6 said, "as discussed," so I'm assuming we had a phone
7 conversation.

8 **Q.** That's a fair stab of having a phone conversation that
9 understandably, you don't remember seven years later,
10 correct?

11 **A.** I don't have a specific memory of it.

12 **Q.** And no memory of any other conversation with Mr.
13 McLellan?

14 **A.** Just I have a vague recollection.

15 **Q.** Just specific recollections.

16 **A.** I only have a vague recollection of speaking with Ross.

17 **Q.** Last subject is the other competing bids. Have you
18 reviewed them in preparation for your testimony?

19 **A.** Well, not only I review them, but other members of the
20 Funds Management Group review them and would collaborate on
21 them.

22 **Q.** Do you recall the JP Morgan proposal?

23 **A.** I remember receiving a proposal from JP Morgan.

24 **Q.** And do you recall that their proposed commission rate
25 exceeded \$4 million for the same transition that you ended up

1 awarding to State Street?

2 **A.** I don't have a recollection of this specific amount from
3 JP Morgan.

4 **Q.** Let me quickly show it to you to refresh your memory. I
5 think it's 491. Page 2 first. Again, it's broken in three
6 parts, because there's three mutual funds that the assets are
7 being traded out of, correct?

8 **A.** Yes. Three. The trading happened out of three mutual
9 funds.

10 THE COURT: You just want him to review it himself,
11 to see if it refreshes his recollection.

12 MR. WEINBERG: Yes. If he can review page 2.
13 Maybe if I can approach the witness?

14 THE WITNESS: Thanks.

15 THE COURT: Yes.

16 He wants you to review it yourself, Mr. Kelly, as
17 you are and when you're done reviewing it, you can look up,
18 and he'll ask you another question.

19 THE WITNESS: Okay. I'm finished.

20 MR. WEINBERG:

21 **Q.** JP Morgan's proposal was to charge three basis points,
22 which would have totaled over \$4 million, correct?

23 **A.** That's what their pre-trade analysis says, yes.

24 MR. WEINBERG: I have no other questions. Thank
25 you, Your Honor.

1 THE COURT: All right. Any redirect?

2 MR. JOHNSTON: No, Your Honor.

3 THE COURT: All right. Thank you very much,
4 Mr. Kelly. You're excused.

5 Next witness.

6 MR. JOHNSTON: Your Honor, the Government calls Tom
7 Clemmenson to the stand.

8 **TOM CLEMMENSON**

9 having been duly sworn, testified as follows:

10 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

11 BY MR. JOHNSTON:

12 **Q.** Good morning, Mr. Clemmenson.

13 **A.** Good morning.

14 **Q.** You can actually move those binders away. They just --
15 you can leave them there.

16 Mr. Clemmenson, where do you live?

17 **A.** Farmington, Connecticut.

18 **Q.** How old are you?

19 **A.** 56.

20 **Q.** Where do you work?

21 **A.** I work at Conning & Company, in Hartford.

22 **Q.** What is Conning & Company?

23 **A.** We're an investment manager.

24 **Q.** What is your position there?

25 **A.** I'm a bond trader.

1 Q. How long have you worked at Conning & Company?

2 A. Coming up on five years.

3 Q. How long have you been in the financial industry, over
4 all?

5 A. Since 1986.

6 Q. What is your educational background?

7 A. BA in economics.

8 Q. Did you used to work at State Street bank?

9 A. Yes.

10 Q. From what years did you work there?

11 A. 2007 to the beginning of 2013.

12 Q. What did you do at State Street bank?

13 A. I was a fixed income trader.

14 Q. Did you work within a particular unit at State Street?

15 A. It was part of the transition management group.

16 Q. You said you traded fixed income?

17 A. Yes.

18 Q. So bonds?

19 A. All bonds, yes.

20 Q. Who did you report to in the 2010/2011 time period?

21 A. Tom Bryant.

22 Q. Who is Tom Bryant?

23 A. He was in charge of our group, as well as the equity
24 traders.

25 Q. Do you know who Tom Bryant reported to at this time

1 period?

2 **A.** Yes, Ross McLellan.

3 **Q.** When you traded in the transition group, for whose
4 benefit would you trade?

5 **A.** For the client's.

6 **Q.** Would you be trading with the client's money or the
7 bank's money?

8 **A.** Client's.

9 **Q.** What was your aim when trading on behalf of transition
10 clients?

11 **A.** To get the best prices we could for the client.

12 **Q.** How did the transition desk make its money?

13 **A.** We -- we would charge what you would call a markup, a
14 commission, a fee for our services.

15 **Q.** Who applied those commissions?

16 **A.** We did that at the trading desk.

17 **Q.** Were those commissions just for the traders or was it for
18 a larger group of folks?

19 **A.** It was my understanding that it was a pool that paid
20 different groups.

21 **Q.** Including transition analysts?

22 **A.** Including transition analysts, correct.

23 **Q.** What are some other terms you use? Markup, markdown
24 commission? Are there any other terms that were used?

25 **A.** We call it fees. It means the same thing. You could

1 take a spread out, yes.

2 **Q.** Did the commissions you charge depend on whether you did
3 a good or bad job?

4 **A.** No.

5 **Q.** How would you know what fees to charge at any given
6 transition?

7 **A.** We were told prior to the beginning of trading what to
8 charge.

9 **Q.** So then who would get the benefit of a better performance
10 in trading?

11 **A.** The client.

12 **Q.** Did you have any direct communications with clients
13 regarding the fees?

14 **A.** No.

15 **Q.** Did you ever negotiate with them about commissions?

16 **A.** No.

17 **Q.** Who would communicate with clients, to your
18 understanding?

19 **A.** Either people in the sales group and potentially the
20 transition managers.

21 **Q.** Did you have an understanding at the time whether
22 commission rates were agreed upon with clients before a
23 transition occurred?

24 **A.** That was my understanding, that they had been agreed
25 upon.

1 **Q.** How would you receive the transition? How would you
2 receive the instructions for what commission to apply to a
3 given trade?

4 **A.** Usually via e-mail for most cases. Sometimes verbally.
5 Very rarely.

6 **Q.** Who in particular would send this by e-mail?

7 **A.** The transition manager who was assigned to that
8 particular transition.

9 **Q.** Directing your attention to February, March 2011, do you
10 recall being involved in a transition for a client named AXA
11 Equitable?

12 **A.** Yes.

13 MR. JOHNSTON: I want to show you a document that's
14 been marked as 102, for the witness only.

15 BY MR. JOHNSTON:

16 **Q.** Do you recognize this document? Is it not on the screen?

17 **A.** No.

18 THE COURT: Should be.

19 MR. JOHNSTON: Let's see if we move into
20 evidence --

21 THE COURT: Hold on. Did you switch to them?

22 THE DEPUTY CLERK: No. Sorry.

23 THE WITNESS: I see it now.

24 BY MR. JOHNSTON:

25 **Q.** Do you recognize this document, Mr. Clemmenson?

1 **A.** Yes.

2 **Q.** What is it?

3 **A.** It's a request for a conference call to discuss an
4 upcoming transition for AXA.

5 MR. JOHNSTON: Your Honor, at this time the
6 Government moves to admit 102.

7 MR. GOLDSTEIN: No objection.

8 THE COURT: Admitted.

9 (Exhibit No. 102 admitted into evidence.)

10 MR. JOHNSTON: And we would at the same time move
11 to admit 102.1, 102.2, 102.3, and 102.4.

12 THE COURT: Admitted.

13 (Exhibit Nos. 102.1, 102.2, 102.3, and 102.4
14 admitted into evidence.)

15 BY MR. JOHNSTON:

16 **Q.** Who is sending -- are you one of the recipients on this
17 e-mail, Mr. Clemmenson?

18 **A.** Yes.

19 **Q.** Who is sending you this e-mail?

20 **A.** Kevin Walker.

21 **Q.** Who is Kevin Walker?

22 **A.** He worked on -- initially, on the transition management
23 desk, and then he had moved to sales.

24 **Q.** Do you know who he reported to?

25 **A.** I believe it was Ross McLellan.

1 **Q.** Let's take a look down below where it says, "We have a
2 call at 3:30 today with the client. Tom, they wanted our
3 head fixed income trading on that call and that is you. Can
4 you familiarize yourself with this transition prior to the
5 call by reviewing the pre-trades and the strat dock?"

6 What is your understanding of what is being asked
7 of you?

8 **A.** We would look at the -- my portion of this would be to
9 look at their bond holdings, give them an idea of how we
10 think it would go, if there were any bonds in there that were
11 going to be difficult to trade.

12 **Q.** Where would you find that information?

13 **A.** Just market knowledge. We could run some pre-trades with
14 some market information.

15 **Q.** And but for a client's specific portfolio, how would you
16 find out what type of bonds were in there?

17 **A.** They would send us a list of what their holdings were, or
18 at least a preliminary list.

19 **Q.** Would any of that be included in a pre-trade information?

20 **A.** Generally, you would see that. I don't know if that's
21 one of the attachments here, but generally you would see
22 that, yes, before we would get on the call, so that we knew
23 what it actually held.

24 **Q.** So what's your understanding of why you're being asked to
25 review these documents?

1 **A.** Because we were the ones that were going to be
2 transacting.

3 **Q.** And by "we," do you mean the trading desk?

4 **A.** Trading desk, yes.

5 **Q.** Do you recall having a conversation with the client on
6 this -- about this particular transition?

7 **A.** Yes, I do.

8 **Q.** And what do you recall?

9 **A.** That we did take a look at their bonds, to give them an
10 idea of what was in store for trading.

11 **Q.** And when you would do this, would you -- what information
12 would you pay attention to in the pre-trade?

13 **A.** My portion would be just to look at the bonds. I wanted
14 to let them know what kind of liquidity they could expect.

15 **Q.** What, if any, attention did you pay to the commission
16 line?

17 **A.** At that point, none.

18 **Q.** And why isn't that something that you would pay attention
19 to?

20 **A.** Because usually before we would trade, we would know --
21 we would be told what the commission would be at that point.

22 **Q.** Let's take a look, if we can --

23 MR. JOHNSTON: Actually, let's just take this down.

24 BY MR. JOHNSTON:

25 **Q.** Were you on a conference call prior to the trading of

1 this transition?

2 **A.** Yes.

3 MR. JOHNSTON: Permission to approach the witness,
4 Your Honor.

5 THE COURT: Yes.

6 MR. GOLDSTEIN: Which number is this?

7 MR. JOHNSTON: It's 116.

8 MR. GOLDSTEIN: There's no objection.

9 MR. JOHNSTON: Okay.

10 At this time, the Government moves to admit 116 and
11 123 into evidence.

12 THE COURT: No objection, right?

13 MR. GOLDSTEIN: No objection.

14 THE COURT: Admitted.

15 (Exhibit Nos. 116 and 123 admitted into evidence.)

16 BY MR. JOHNSTON:

17 **Q.** Mr. Clemmenson, if we could turn to your tab -- in the
18 binder that I handed you, and go to tab 116.

19 **A.** Okay.

20 (Audio plays.)

21 BY MR. JOHNSTON:

22 **Q.** Mr. Clemmenson, who were you having a conversation with
23 on this call?

24 **A.** Ross McLellan.

25 **Q.** Who else is on this call?

1 **A.** Peter Weiner, Kevin Walker, and Greg Spyropoulos.

2 **Q.** Who are Peter Weiner and Kevin Walker?

3 **A.** They were in the sales group.

4 **Q.** Who is Greg Spyropoulos?

5 **A.** He worked on the trading desk.

6 **Q.** Directing your attention to page 2, is it typical to
7 receive charging instructions from Ross McLellan?

8 **A.** It was not the norm, no.

9 **Q.** Do you have a memory of any other instance of Mr.
10 McLellan telling you how much to charge a client?

11 **A.** Not that I recall, no.

12 **Q.** Let's take a look at line 10 -- or, I'm sorry, start at
13 line 11, where he says -- where Mr. McLellan says "Because
14 SSGA is a manager, basically what they are saying is we've
15 got to come up with fair pricing with respect to what we're
16 doing for this."

17 Do you have an understanding of what Mr. McLellan
18 means when he says we have got to come up with fair pricing?

19 **A.** Not particularly. I mean, fair pricing I would assume
20 would mean getting the best prices we could get in the
21 marketplace.

22 **Q.** Do you have any -- do you have an understanding whether
23 that refers to commission, or whether it refers to just you
24 going out in the market and buying?

25 **A.** In this instance, no, because it's not very clear.

1 **Q.** You're not sure one way or the other what he means?

2 **A.** No.

3 **Q.** Let's go further down, where -- on line 14, Mr. McLellan
4 says "We will trade the corporates just flat, so just book
5 those out, straighten that out to the client, whatever you
6 guys are dealing, and then the rest of the bulk of the trade
7 is mortgages and treasuries."

8 What do you understand Mr. McLellan to mean when he
9 says that?

10 **A.** Corporate bonds that were held in the portfolio, we would
11 trade with no commission or no fee, and then we would charge
12 on treasuries and mortgage securities.

13 **Q.** Before testifying today, did you take a look at the --
14 those pre-trade reports that we looked at on Exhibit 102?

15 **A.** Yes, I would have flipped through those, yes.

16 **Q.** And what's your understanding of the composition of the
17 portfolio between corporates and mortgages and treasuries?

18 **A.** The majority was mortgages and treasuries.

19 **Q.** Let's go further down, where Mr. McLellan says "And right
20 there, for the first few days, what we will do is we will
21 take three quarters of the basis point of yield and then
22 obviously we will see how performance is going from there and
23 see if we need to adjust, whatnot."

24 What's your understanding of what that means?

25 **A.** Well, I think we'll probably look at what the commissions

1 are earned up until that point and then reevaluate.

2 **Q.** What's the amount that you understand him to be
3 instructing you to apply?

4 **A.** Three quarters of a basis point of yield.

5 **Q.** Now, do you know -- is there a difference between basis
6 points of yield and basis points of value?

7 **A.** Yes.

8 **Q.** What's the relationship between the two?

9 **A.** It depends on the term of the security, how long it is.

10 **Q.** Typically -- typically, is a basis point of yield a
11 larger -- if you're talking about commissions, is a basis
12 point of yield more than a basis point of value?

13 **A.** It could be. It would depend on the duration of the
14 securities.

15 **Q.** What types of -- what duration is yield higher than
16 value?

17 **A.** The longer ones are higher, yes.

18 **Q.** Was it typical for you to adjust your commission rate,
19 based on the performance of your trading?

20 **A.** I would say that wasn't the norm, but we did do it
21 occasionally.

22 **Q.** And the few occasions where you did do it, did you adjust
23 it up, or did you adjust it down?

24 **A.** I think usually it would have been down, I think.

25 **Q.** Do you have any memory of ever adjusting compensation up

1 in the course of trading?

2 **A.** Not that I can recall, no.

3 **Q.** In the instances when you adjust it down, what was your
4 understanding of what the commission agreement had been with
5 clients?

6 **A.** That whatever it was, that we were getting near that
7 level of compensation, and that we could turn it off.

8 **Q.** What do you mean by the level of compensation?

9 **A.** Whatever that was agreed upon with the client to charge
10 overall.

11 **Q.** Are you referring to a capped commission?

12 **A.** It could have been a cap, yes.

13 **Q.** What is a capped commission arrangement?

14 **A.** Where you would agree to, say, trade to portfolio for,
15 say, \$100,000 commission, and when you got there, you would
16 stop.

17 **Q.** So commission would be on initially?

18 **A.** Yes.

19 **Q.** And then when would it stop?

20 **A.** If we reached that cap, we would turn it off.

21 **Q.** Do you have an understanding, based on looking at the
22 portfolio here, whether three-quarters of a basis point of
23 yield is -- on just treasuries and mortgages, is more or less
24 than .1 basis points of yield applied to the entire
25 portfolio?

1 **A.** It, generally, would be higher, yes.

2 **Q.** And that's based on what?

3 **A.** Just the overall -- so instead of a tenth of a basis
4 point, you're charging three-quarters of a basis point, so
5 it's a higher value.

6 **Q.** So even if the corporates are flat, it would still be
7 higher, with three-quarters on the other two. Is that what
8 you're saying?

9 **A.** Yeah, that could definitely be the case, yeah.

10 MR. JOHNSTON: Let's continue, please.

11 (Audio plays.)

12 BY MR. JOHNSTON:

13 **Q.** Mr. Clemmenson, drawing your attention to page 3 on
14 line 10, why do you ask if this is going to be done as a
15 principal, or an agent?

16 **A.** It's purely for bookkeeping purposes on our part.

17 **Q.** And when you mean -- when use the word "principal," do
18 you mean principal-principal, or riskless principal?

19 **A.** Riskless principal.

20 **Q.** And why are you -- what's the significance of one versus
21 the other --

22 **A.** For our job, it would be risk as principal. We could
23 essentially book one side of the trade and sort of flip the
24 ticket and book the other. Where as if we did it as agent,
25 we'd have to take each ticket and manually type in the

1 commission on each bond as we went. So as you can see, 4,000
2 line items times two tickets would be a lot of inputs.

3 **Q.** How much more time would that take you?

4 **A.** Oh, a fair amount of time longer.

5 **Q.** Did the designation as riskless principal or agent affect
6 how you did your trading?

7 **A.** No.

8 **Q.** Or how you applied commission?

9 **A.** No.

10 **Q.** What was its significance to you?

11 **A.** The amount of work.

12 MR. JOHNSTON: If we could jump forward to -- I
13 think we start at 9:20, please. So skip forward, starting at
14 page 8 of this same call.

15 THE COURT: Where on page 8?

16 MR. JOHNSTON: Yeah, page 8, Your Honor.

17 THE COURT: No, but what line?

18 MR. JOHNSTON: We will be beginning on line 18 at
19 page 8.

20 (Audio plays.)

21 BY MR. JOHNSTON:

22 **Q.** Mr. Clemmenson, drawing your attention to the bottom of
23 page 8, who's speaking on line 18?

24 **A.** Kevin Walker.

25 **Q.** And when he says, "So I think Ross mentioned, Ross, you

1 mentioned three-quarters of yield, you know, normally Kristen
2 I think has to send that over as part of the process."

3 What do you understand Mr. Walker to be saying?

4 **A.** He's saying you charge three-quarters basis point of a
5 yield.

6 **Q.** Why is there a reference to Kristen?

7 **A.** Because I believe she was the transition analyst that was
8 assigned to this one.

9 **Q.** What's Kristen's last name?

10 **A.** Morris.

11 **Q.** So what's the typical process for receiving the
12 commission number?

13 **A.** We would generally get it via e-mail.

14 **Q.** From someone in Ms. Morris' position?

15 **A.** Yes.

16 **Q.** And so what is Mr. Walker telling you to do?

17 **A.** He's telling us to apply the three-quarters of a basis
18 point of yield and just let Kristen know that if she has
19 something different, that we had spoken to Ross.

20 **Q.** And then on the top of page 9, when you say, "Yeah, okay,
21 and we'll do the corporates flat."

22 So, okay, what do you mean by that?

23 **A.** Just reenforcing that we're charging no fee on the
24 corporate bonds that were held.

25 **Q.** And then what are you -- which bonds are you charging the

1 fee on?

2 **A.** The treasuries and the mortgages.

3 **Q.** Do you recall conducting these trades, Mr. Clemmenson?

4 **A.** Yes.

5 MR. JOHNSTON: I want to show you a document, for
6 the witness only, 122.

7 BY MR. JOHNSTON:

8 **Q.** Do you recognize this document?

9 **A.** Yes.

10 **Q.** What is it?

11 **A.** It's an e-mail we sent from the trading desk to Kristen.

12 **Q.** What's the date on the e-mail?

13 **A.** March 7, 2011.

14 MR. JOHNSTON: Your Honor, at this time, the
15 Government moves to admit 122 and 122.1.

16 MR. GOLDSTEIN: No objection.

17 THE COURT: Admitted.

18 (Exhibit Nos. 122 and 122.1 admitted into
19 evidence.)

20 BY MR. JOHNSTON:

21 **Q.** Who is Greg Spyropoulos?

22 **A.** He worked with us on the trading desk.

23 **Q.** Are you one of the recipients on this e-mail?

24 **A.** Yes.

25 **Q.** What is your understanding of why you're included on this

1 e-mail?

2 **A.** As one part of who was trading in that transition.

3 **Q.** What's attached to this e-mail?

4 **A.** The executions of the trades that were done on that day.

5 **Q.** So March 7, 2011?

6 **A.** Yes.

7 MR. JOHNSTON: Let's take a look at the attachment,
8 122.1, starting with page 1. If we can just start with where
9 the name is and maybe the first to third, Erin.

10 BY MR. JOHNSTON:

11 **Q.** What are we looking at on this page, Mr. Clemmenson?

12 **A.** There's the information pertaining to the bonds that we
13 traded on that given day.

14 **Q.** So which bonds are captured here in this blowout?

15 **A.** Right here those are all corporate bonds and there's one
16 municipal.

17 **Q.** And so how much commission has been applied to the
18 corporate bonds?

19 **A.** Zero.

20 **Q.** Let's take a look at page 2, please. We can zoom in at
21 the bottom half.

22 What types of bonds are we looking at on this part
23 of page 2?

24 **A.** Oh, there's some mix. There's some corporate bonds, some
25 treasury notes, some mortgages. Commercial mortgage paper.

1 **Q.** Which bonds here have commissions applied to them?

2 **A.** The treasury notes and the mortgage bonds.

3 **Q.** Is this consistent or inconsistent with the instructions
4 you were given on the March 2nd call?

5 **A.** That's consistent.

6 MR. JOHNSTON: You can take this down, Erin.

7 BY MR. JOHNSTON:

8 **Q.** On the following day, March 8, 2011, did you have a phone
9 call with the defendant about this trading?

10 **A.** Yes.

11 MR. JOHNSTON: I'd like to direct your attention to
12 the tab behind 123.

13 (Audio plays.)

14 BY MR. JOHNSTON:

15 **Q.** Mr. Clemmenson, drawing your attention to page 2, where
16 Mr. McLellan tells you on line 6, "Keep chugging along, stay
17 with that plan, half a bit of yield on everything, but the
18 corporates do zero."

19 What's your understanding of what he's telling you
20 to do?

21 **A.** To continue trading corporates flat and apply a half a
22 basis point of yield on everything else.

23 **Q.** If you recall the conversation from March 2nd, you were
24 instructed, in the phone call, three-quarters of a basis
25 point of yield. Do you have an understanding of why this

1 number was different?

2 **A.** Well, not knowing what they agreed on with the client,
3 I'm assuming he's adjusting, because he is in a better
4 position to have the information than I am.

5 **Q.** So from this conversation, do you have an understanding
6 of what commission you would be applying to these trades?

7 **A.** Yes. Half a basis point of yield.

8 **Q.** And then further down, where you say, "Yeah, we haven't
9 put those in yet. That's the commission we're going to
10 have."

11 What are you referring to?

12 **A.** I think we figured -- the commission that we would have,
13 based on the trades that we hadn't booked yet.

14 **Q.** So at this point, has the -- how much of the commission
15 has been booked out?

16 **A.** I think it looks like, from what -- Steve, that we had
17 70,000 booked out at that point.

18 **Q.** And do you know from this how much more is about to be
19 booked out?

20 **A.** Not from this I don't, no. But it would be high -- it
21 would be more than what we pitch as the 70,000, yeah.

22 **Q.** Did you have an understanding whether the client had
23 agreed to any change in commission rate?

24 MR. GOLDSTEIN: I object. There's no foundation
25 for this question.

1 THE COURT: Sustained.

2 MR. JOHNSTON: Your Honor, can I ask did he have an
3 understanding --

4 BY MR. JOHNSTON:

5 Q. Why are you following Mr. McLellan's order here?

6 A. Because he's the boss. He has more information than I
7 would have.

8 Q. Did you have more or less information than Mr. McLellan
9 as to what any client had agreed to?

10 A. I would have less.

11 MR. JOHNSTON: No further questions.

12 THE COURT: All right. Cross-examination.

13 MR. GOLDSTEIN: Thank you, Your Honor.

14 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

15 BY MR. GOLDSTEIN:

16 Q. You just testified -- good morning, Mr. Clemmenson.

17 A. Good morning.

18 Q. You just testified that Mr. McLellan was the boss, right?

19 A. Correct.

20 Q. And you also testified a little bit earlier that
21 Mr. Bryant reported to Mr. McLellan, right?

22 A. Yes.

23 Q. Mr. McLellan had a very wide array of responsibilities in
24 his position, correct?

25 A. Yes.

1 Q. Meaning it's not simply you, Mr. Bryant, and a few other
2 of the traders. He's responsible for the US trading; is that
3 correct?

4 A. Yes.

5 Q. You knew he was also responsible at the same time for
6 EMEA; is that correct?

7 A. Yes.

8 Q. Also responsible for Asia Geographic Territory, correct?

9 A. Yes.

10 Q. Meaning the organizational chart that was under Ross
11 McLellan was incredibly extensive, wasn't it?

12 A. You could say that, yes.

13 Q. Mr. Johnston asked you at the beginning of his
14 examination about if you knew where -- well, strike that.
15 You were a bond trader, right?

16 A. Correct.

17 Q. Fixed income is another way to say bonds, right?

18 A. Yes.

19 Q. And you worked within the broker-dealer at State Street,
20 correct?

21 A. Yes.

22 Q. State Street Global Markets LLC, correct?

23 A. Yes.

24 Q. All right. And inside of the broker-dealer, there's your
25 side of the sort of corporation, which is fixed income of

1 bonds, and there's also equity traders, correct?

2 **A.** Yes.

3 **Q.** All right. And so you -- I think you have a degree from
4 Trinity; is that correct?

5 **A.** Yes.

6 **Q.** All right. And you know who Mr. Finocchi is, right?

7 **A.** Yes.

8 **Q.** Went to the -- got a master's from the University of
9 Chicago. Are you aware of that?

10 **A.** I think I remember that, yes.

11 **Q.** How about Mr. Dionisio, do you know he had two degrees,
12 two master's degrees from Boston University?

13 **A.** No, I didn't know that.

14 **Q.** The point is, talented guy, doing a difficult job,
15 meaning executing orders in the marketplace, correct?

16 **A.** Yes.

17 **Q.** All right. And so let me talk to you about the process a
18 little bit. Transition management is composed of different
19 roles and responsibilities, right? You have the analyst on
20 one side and you have traders, like yourself, on the other
21 side, correct?

22 **A.** Uh-huh.

23 **Q.** And so when a client comes to, for example, State Street
24 Bank Europe Limited, are they -- are you aware that they
25 negotiate a transition management agreement with that

1 particular corporate entity, meaning State Street Bank Europe
2 Limited?

3 MR. JOHNSTON: Objection, Your Honor. The witness
4 doesn't work in Europe.

5 THE COURT: Sustained.

6 BY MR. GOLDSTEIN:

7 Q. Transition management clients negotiate -- as you
8 testified on direct examination, negotiate commissions in the
9 terms of the transition management with the transition
10 management sales side, correct?

11 A. That's my understanding.

12 Q. And you don't have a role in that process, right?

13 A. No, I do not.

14 Q. And then the analyst architect the strategy that is going
15 to be put in place for that particular client, right?

16 A. Yes.

17 Q. And that in and of itself is a complicated process that
18 takes time and resources for that personnel within that
19 department of State Street, correct?

20 A. I never did that, but I would assume, yeah, there's some
21 work involved in that, yes.

22 Q. And then eventually, once that plan is architected,
23 developed, it's the execution side, meaning to execute that
24 strategy, orders are transmitted to the broker, such as
25 yourself, or the broker-dealer, right?

1 **A.** Yes.

2 **Q.** All right. And broker-dealers are compensated for the
3 services that they provide, right?

4 **A.** Yes.

5 **Q.** All right. And so when you receive an order to execute a
6 security transaction on behalf of a client of a transition
7 management, you then go to the marketplace to fulfill that
8 order, right?

9 **A.** Yes.

10 **Q.** All right. Now, inside of that marketplace, there are
11 what's known as counterparties, correct?

12 **A.** Yes.

13 **Q.** All right. And so when you go to the marketplace and
14 you're looking to execute orders, you are -- best execution
15 is trying to find the right counterparty, right?

16 **A.** Yes.

17 **Q.** Putting trades into competition, right?

18 **A.** Correct.

19 **Q.** And on the other side of you, meaning these
20 counterparties, are people working against you to try and get
21 the best prices on behalf of their clients, right?

22 **A.** Well, not necessarily their clients. They may be trading
23 for their own books.

24 **Q.** Exactly. Meaning so when you go to the marketplace,
25 you're in competition with people on the other side, right?

1 **A.** Yes. Potentially.

2 **Q.** Right. And so part of the job of a good trader is to go
3 and figure out and compete against these other counterparties
4 that are in the marketplace, right?

5 **A.** In some sense, yes. I mean, we're not necessarily
6 competing with them, because we're not running a book, so
7 they're trading a proprietary book. We were not. We needed
8 them for liquidity.

9 **Q.** Fair enough. So you're trying to locate the best
10 counterparty, right?

11 **A.** Correct.

12 **Q.** These other counterparties have their own interest at
13 stake, not your interest, right?

14 **A.** Correct.

15 **Q.** Not the transition management client's interest, right?

16 **A.** Right.

17 **Q.** The point is that it's a difficult, challenging job going
18 to the marketplace and executing orders in your position as a
19 bond trader, right?

20 **A.** It can be.

21 **Q.** People on the other side may have algorithms they're
22 using our computer models to figure out what prices they
23 wanted to get their particular transactions at, right?

24 **A.** It could be.

25 **Q.** Okay. And as part of that process, you testified that

1 the broker-dealer earns remuneration, or is paid for the
2 services that they provide, right?

3 **A.** Yes.

4 **Q.** Mr. Johnston asked you a question about where that
5 compensation or commission went and you testified you thought
6 it went to a pool that was divided amongst different units,
7 right?

8 **A.** Right.

9 **Q.** You didn't work in the finance department at State
10 Street, right?

11 **A.** No.

12 **Q.** You weren't on the executive management committees,
13 right?

14 **A.** No.

15 **Q.** The point is, you have no idea how that money is actually
16 divided up within the different State Street corporations,
17 right?

18 **A.** That would be correct.

19 **Q.** Okay. You testified that Mr. Walker reported to Ross.
20 Didn't he, in fact, report to Mr. Weiner?

21 **A.** That I don't recall, if he did or not.

22 **Q.** Let me direct your attention to Exhibit 116, please.
23 It's the audio -- transcript of the audio that you -- you
24 were asked to review with Mr. Johnston. The participants on
25 that call were yourself, right?

1 **A.** Yes.

2 **Q.** Ross, correct?

3 **A.** Correct.

4 **Q.** Gregory Spyropoulos?

5 **A.** Correct.

6 **Q.** Kevin Walker?

7 **A.** Yes.

8 **Q.** And Peter Weiner or *Weiner*, right?

9 **A.** Right.

10 **Q.** Many people on the phone, right?

11 **A.** Uh-huh.

12 **Q.** Mr. McLellan is on the phone, speaking openly and
13 transparently with those on this conference call, right?

14 **A.** Yes.

15 **Q.** Okay. And so if I can direct your attention to page 2,
16 where Mr. McLellan said, "We got a good flavor of what you're
17 looking for" -- this starts at line 8, Mr. Clemmenson -- "you
18 know, obviously we want to make a couple of bucks on this
19 trade."

20 Do you see that?

21 **A.** Yes.

22 **Q.** Broker-dealer's in the business of making money, right?

23 **A.** Correct.

24 **Q.** Given the amount of work that goes into it, he says,
25 right?

1 **A.** Yes.

2 **Q.** Not an easy process, right? As we just reviewed?

3 **A.** Right.

4 **Q.** Correct?

5 **A.** Correct.

6 **Q.** He said, "You know SSGA is the manager."

7 Do you see that?

8 **A.** Yes.

9 **Q.** SSGA is State Street Global Advisors, right?

10 **A.** Yes.

11 **Q.** Different unit within State Street, right?

12 **A.** Yes.

13 **Q.** Provides asset investment or asset management investment
14 advice to different entities throughout the United States and
15 even internationally, right?

16 **A.** Yes.

17 **Q.** And he said, "Because SSGA is the manager, basically what
18 they are saying is we have got to come up with fair pricing,"
19 right?

20 **A.** Yes.

21 **Q.** And so what he's saying to you there is that what they
22 are saying refers to State Street Global Advisors, right?

23 **A.** Right.

24 **Q.** They're telling Mr. McLellan he has to come up with fair
25 pricing, right?

1 **A.** Yes.

2 **Q.** And you say okay, right?

3 **A.** Yes.

4 **Q.** And Mr. Johnston asked you a series of questions, also,
5 Mr. Clemmenson, about things, whether you recall. Like do
6 you recall Mr. McLellan giving verbal instructions like this
7 or do you recall certain instances, and your testimony was
8 that you don't recall it, right?

9 **A.** Right.

10 **Q.** Now, this was 2011, right?

11 **A.** Correct.

12 **Q.** It's a long time ago?

13 **A.** Yes.

14 **Q.** All right. And you're not testifying it never happened
15 before, your testimony is, as you sit here today, you just
16 don't recall, right?

17 **A.** That's correct. I don't recall it happening.

18 **Q.** Now, Mr. McLellan says, at line 14, "We'll trade the
19 corporates just flat."

20 Do you see that?

21 **A.** Yes.

22 **Q.** All right. And if we could have exhibit --

23 MR. WEINBERG: Max, if we could have Exhibit 122-1.

24 BY MR. WEINBERG:

25 **Q.** This was the spreadsheet Mr. Johnston showed you, where

1 the corporates weren't -- there was no commission attached to
2 the corporate trade, right?

3 **A.** Yeah, I don't see it here, but yes.

4 **Q.** But you recall that testimony, right?

5 **A.** Yes.

6 **Q.** Okay. And Mr. Johnston showed you a couple of those
7 spreadsheets, pointing out that corporates did not have
8 commissioned charged on it, right?

9 **A.** Yes.

10 **Q.** And that goes back to what Mr. McLellan says during this
11 conversation that corporates will be traded flat, right?

12 **A.** Correct.

13 **Q.** And if you look at line 21, on page 2, there's a
14 discussion in terms of about 4,000 tickets, right?

15 **A.** Yes.

16 **Q.** And you also testified, when reviewing this conversation,
17 that you asked about riskless principal or agency, because it
18 implicated booking issues for you, in terms of executing
19 these security orders, correct?

20 **A.** Yes.

21 **Q.** Meaning it was a -- it was a highly intensive manual
22 responsibility to try and book these kinds of trades, right?

23 **A.** Yes, it was a manual process.

24 **Q.** Right. And so corporates -- you know what a TRACE
25 reporting system is, right?

1 **A.** Yeah.

2 **Q.** All right. Corporates are TRACE reportable, but only if
3 there's a markup or a commission attached to it, right?

4 **A.** No, all trades go to TRACE.

5 **Q.** Even if there's no markup or commission to it?

6 **A.** Correct.

7 **Q.** And you're sure about that?

8 **A.** Pretty sure about that. Yeah.

9 **Q.** Okay. In any event, if corporates were not -- strike
10 that.

11 If corporates are not TRACE reportable -- well,
12 strike that.

13 TRACE requires that all of the tickets be reported
14 into the TRACE system within 15 minutes, right?

15 **A.** Correct.

16 **Q.** Did you load all of these into -- all of these -- there
17 are 2,300 corporates in this particular transaction, right?

18 **A.** I don't recall the actual total number.

19 **Q.** Do you recall loading -- and you would have to do it
20 twice, right? The original ticket and the second ticket,
21 right?

22 **A.** Yes.

23 **Q.** So if it was 2,300, that would be 4,600 tickets, right?

24 **A.** Yes.

25 **Q.** TRACE requires that it be inputted within 15 minutes of

1 the order, correct?

2 **A.** Yes.

3 **Q.** Are you testifying that you loaded those 4,600 orders
4 into TRACE within the 15 minutes?

5 **A.** No, if you look at that spreadsheet, the amount of
6 corporates that on there are not a lot, and there was three
7 of us that were trading.

8 **Q.** And the maximum per day that you could do in terms of
9 reporting to Trace was what? 150?

10 **A.** Probably 150, doing it manually per man. You probably
11 could do that.

12 **Q.** On page 4 of the transcript, which Mr. Johnston did not
13 go through with you --

14 THE COURT: Mr. Johnston, how much longer do you
15 have?

16 MR. GOLDSTEIN: A little bit. We can break, Your
17 Honor.

18 THE COURT: We'll take the morning break, ladies
19 and gentlemen. All rise for the jury.

20 (The jury exits the courtroom.)

21 THE COURT: All right. We'll stand in recess,
22 we'll resume at 25 after.

23 (Court in recess at 11:09 a.m.
24 and reconvened at 11:25 a.m.)

25 THE CLERK: All rise. The McLellan matter is back

1 in session.

2 THE COURT: You can go get the jury.

3 Please be seated.

4 (Jury entered the courtroom.)

5 THE COURT: Please be seated.

6 Go ahead, please.

7 MR. GOLDSTEIN: Thank you, Your Honor.

8 BY MR. GOLDSTEIN:

9 Q. Before the break, we addressed the subject of trace
10 reporting requirements, right?

11 A. Yes.

12 Q. In your capacity of your executing corporate bond
13 purchase, okay, you go to the marketplace, let's say Goldman
14 Sachs sells you a bond for a hundred. Goldman Sachs is then
15 responsible for reporting that sale within the trace
16 reporting system, correct?

17 A. Yes. They would report their side of the trade, yes.

18 Q. And if State Street did not add any markup or commission
19 to that particular purchase or sale, there would be no trace
20 reporting requirements for State Street, correct?

21 A. No. Being a broker-dealer, we would have to report that.

22 Q. Even if there's no markup?

23 A. Right. We report our trade as well as the client side
24 price, too.

25 Q. Is your testimony that you reported all of these

1 corporate bond purchases of sales for AXA within trace
2 reporting requirements?

3 **A.** Yes. Over the 10-day period, yes, we would.

4 **Q.** Instanet is the system that relates to equities only.
5 Are you familiar with that?

6 **A.** No.

7 **Q.** Have you ever heard of Instanet?

8 **A.** I've heard of it, yes.

9 **Q.** Not part of your process in fixed income?

10 **A.** No.

11 **Q.** When you ultimately did execute orders, there are
12 confirmations generated, correct? Confirms?

13 **A.** Yes.

14 **Q.** And those confirms or confirmations are sent to a
15 client's custodian bank or custody bank, correct?

16 **A.** Yes. I would say -- I'm not overly familiar with that
17 process. It was out of the back office.

18 **Q.** Are you generally familiar with that concept?

19 **A.** Yes.

20 **Q.** Have you seen confirms? Do you see where it notes on the
21 confirmation whether a particular transaction was done on an
22 agency or riskless principal basis?

23 **A.** I generally wouldn't have seen any confirms, no.

24 **Q.** But riskless principal was the default trading -- the way
25 the default trade that you executed transactions, correct,

1 riskless principal?

2 **A.** For the most part, yes.

3 **Q.** Whether or not it was riskless principal or agency,
4 broker-dealer could be entitled to added markup or markdown,
5 correct?

6 **A.** If that was agreed on, yes.

7 MR. GOLDSTEIN: Now I'd like to try my hand at a
8 chalk, Your Honor, if I could, an illustrative chalk. Could
9 we have the ELMO, please?

10 THE COURT: Sure.

11 BY MR. GOLDSTEIN:

12 **Q.** So, Mr. Clemmenson, you did -- as part of your job within
13 State Street, you did execute fixed-income instruments sent
14 to you by State Street Bank Europe, Limited, correct?

15 **A.** If it was a global transition, we would.

16 **Q.** Right. State --

17 MR. JOHNSTON: Objection. Beyond the scope. He
18 never testified about doing any transitions for Europe.

19 THE COURT: Overruled.

20 Go ahead.

21 BY MR. GOLDSTEIN:

22 **Q.** You would receive orders from State Street Bank Europe,
23 Limited, correct?

24 **A.** Yes.

25 **Q.** And by "you," I mean State Street Global Markets,

1 correct?

2 **A.** Yes.

3 **Q.** The broker-dealer?

4 **A.** Yes.

5 **Q.** So if this is you, State Street Global Markets, LLC, and
6 this is State Street Bank Europe, Limited, you would receive
7 orders for execution from State Street Bank Europe, Limited,
8 correct?

9 **A.** Yes. We could receive something from a TM analyst in
10 London.

11 **Q.** And you are the broker-dealer, correct?

12 **A.** Mm-hmm.

13 **Q.** And this is the bank entity; is that correct?

14 MR. JOHNSTON: Objection, Your Honor. Could we
15 have a sidebar, please?

16 THE COURT: All right.

17 (At sidebar on the record.)

18 THE COURT: Are you worried that Mr. Goldstein's
19 artistic skills are going to so outshine the lawyers from
20 Washington, this could be done?

21 MR. JOHNSTON: I do. I think this could be the
22 nail in the coffin for us.

23 Our problem is obviously they're trying to use this
24 witness to advance another part of the case that had nothing
25 to do with the direct testimony, and we understand that

1 that's -- may be in their interest, but that's really not
2 consistent with the rules here where they should confine
3 their cross-examination to the scope of the direct. And he
4 already said -- he didn't testify about Europe, and now we're
5 frolicking in this transnational --

6 THE COURT: What's the scope?

7 MR. GOLDSTEIN: The frolic, Your Honor, is that he
8 testified at length about his role as a fixed-income trader
9 for State Street. And so I think the jury needs to
10 understand exactly what that role is. He testified that he
11 executed orders on behalf of State Street Bank Europe --

12 MR. FRANK: No, he didn't.

13 MR. JOHNSTON: You asked about that on cross; we
14 didn't ask about Europe.

15 MR. GOLDSTEIN: Right, and he answered it.

16 MR. JOHNSTON: Over our objection.

17 MR. GOLDSTEIN: Unfortunately, I think the
18 government skipped kindergarten where they're not told it's
19 not polite to interrupt people. If I could just finish what
20 I'm saying, you guys will have a chance, okay?

21 THE COURT: He has a point.

22 MR. FRANK: We're also engaging on *ad hominem*
23 attacks.

24 THE COURT: Let me make a couple of things clear.
25 One, you've all had *ad hominem* attacks that have not been up

1 to the level of professionals that all of you are, that I not
2 only expect but all of you actually display. You have some
3 real good lawyers here, but there's been allegations of
4 disingenuous behavior.

5 I get it; this is an important case for all of you
6 and you all get stressed. You've all done it,
7 all four of you, okay. I don't view any of you
8 less for having done it because I think all of
9 you are good lawyers, and it happens. It's a
10 stressful trial. It's a lot at stake for the
11 government, it's a lot at stake for the
12 defendant. So move on.

13 Those things are rolling off my back, I'm not
14 interested in them, I don't care, it doesn't move
15 me.

16 The main point is what is helpful is to not
17 interrupt the other person because I can hear it
18 and I go one at time. You've all been to some
19 extent guilty of that as well.

20 So tell me why this area, it's beyond the scope of
21 the direct, to the extent it's -- to the extent
22 it's beyond the scope of the direct, where are we
23 going?

24 MR. GOLDSTEIN: I just want to explain to the jury
25 the process is that the broker-dealer receives an order, it

1 goes to the marketplace, does best execution. There's
2 nothing inconsistent with what he testified to in terms of
3 going to the marketplace and adding a commission or a markup,
4 that best execution means going to the marketplace and
5 soliciting and obtaining the best price for the customer,
6 whether it's riskless principal or agency. The broker-dealer
7 has a custom --

8 THE COURT: You do not intend to get into
9 individual trades.

10 MR. GOLDSTEIN: No.

11 THE COURT: It's more of just an exemplar.

12 MR. GOLDSTEIN: Yes.

13 MR. FRANK: Can I say --

14 THE COURT: Sure.

15 MR. FRANK: He can do that in the United States.
16 He doesn't have to go to State Street. There's a
17 considered -- I don't want to make any allegation, but it's
18 remarkable to me that he's talking about State Street Bank
19 Europe, Limited.

20 The defense is a contractual element with respect
21 to the complaints about State Street Bank Europe, Limited's
22 interaction with other State Street Bank entities.

23 This witness is not that witness. If they want to
24 call him in their direct case, they can recall him for that.
25 In our case, he testified to AXA. They went into great

1 length to make clear that there was no contract with AXA.
2 There's no issue about State Street Bank Europe, Limited with
3 AXA. So if they want to make the point he executes trades as
4 riskless principal on behalf of some other entity -- I don't
5 know what relevance it has here because there's no contract
6 with AXA entered into by another entity, but if they want to
7 try to make that argument, fine.

8 But why is he talking about State Street Bank
9 Europe, Limited? That's an unrelated part of the case that
10 he's trying to bring in through this witness.

11 MR. GOLDSTEIN: It's completely consistent with his
12 testimony --

13 THE COURT: It's overruled, go ahead.

14 MR. GOLDSTEIN: Thank you.

15 (End of discussion at sidebar.)

16 BY MR. GOLDSTEIN:

17 **Q.** Mr. Clemmenson, to get back to my questions, State Street
18 Bank Europe is one of the transition management desks that
19 would send orders to the broker-dealer SSGM, LLC, meaning to
20 you, correct?

21 **A.** Yes, it was a global transition, yes, if they held U.S.
22 dollar bonds.

23 **Q.** Exactly. And they would do that on behalf of a client of
24 State Street Bank Europe, Limited, right?

25 **A.** Yes.

1 Q. Now, you as the broker-dealer, you go to the marketplace
2 to find a counterparty, correct?

3 A. Yes.

4 Q. And so what you do is you put in a competitive process.
5 You put these counterparties in competition with each other
6 on behalf or as to try to secure best execution for your
7 client, correct?

8 A. Yes.

9 Q. And so when you go to the marketplace and you engage all
10 of these different counterparties, there's different
11 considerations that you take into consideration when
12 selecting the right counterparty, correct?

13 A. Generally, no. We'd send it out to a list of
14 counterparties.

15 Q. Okay. And looking for what from them?

16 A. Best price.

17 Q. Best price, right.

18 And so there's never an occasion where you would
19 get, say, an offer of a hundred and an offer of 102 and you'd
20 take the worst of the two prices, right?

21 A. No.

22 Q. Meaning you would always go to the marketplace and
23 execute best execution, meaning getting the best price on
24 behalf of your client, right?

25 A. Correct.

1 **Q.** Okay. And after that process is done and you've selected
2 the best price, at some point in time, as you testified, a
3 confirmation is sent to a custody bank for the client,
4 correct?

5 **A.** Yes.

6 **Q.** And so when Mr. --

7 MR. GOLDSTEIN: If we could have Exhibit 4, Max,
8 please, page 4.

9 Global fixed income, please.

10 **Q.** So where it stays State Street is a lead agency
11 fixed-income trading firm, that's accurate, right?

12 **A.** I believe so. I'm not involved in the marketing, in the
13 wording of the marketing, so --

14 **Q.** And it -- your trading desk did try to leverage your size
15 to achieve best execution, right?

16 **A.** Yes.

17 **Q.** That's what you did in relation to the AXA transaction,
18 correct?

19 **A.** Yes.

20 **Q.** And that's what you would do as a matter of practice
21 under Mr. McLellan's leadership, correct?

22 **A.** Yes.

23 **Q.** There's nothing inconsistent about going to the
24 marketplace as a riskless principal or an agent and then
25 after that process is complete, meaning after you've secured

1 the best price for your client, there's nothing inconsistent
2 with you then adding a markup or markdown to compensate you,
3 the broker-dealer, for the services that you've provided,
4 correct?

5 **A.** Correct. We would -- whatever the markup we were told to
6 apply, yes, would be applied.

7 MR. GOLDSTEIN: Nothing further, Your Honor.

8 THE COURT: Any redirect?

9 MR. JOHNSTON: Yes, briefly, Your Honor.

10 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

11 BY MR. JOHNSTON:

12 **Q.** Mr. Clemmenson, you were asked some questions about trace
13 reporting, correct?

14 **A.** Yes.

15 **Q.** Of the three types of bonds that you traded in the AXA
16 transition, which of them at that time reported the trace?

17 **A.** Only corporate bonds.

18 **Q.** Did you apply commissions to corporate bonds?

19 **A.** No.

20 **Q.** What were the other two types of commissions, two types
21 of bonds you traded?

22 **A.** Mortgage securities and treasury securities.

23 **Q.** Did you apply commissions to those bonds?

24 **A.** Yes.

25 **Q.** You were asked some questions about trade confirmations.

1 Have you seen any trade confirmations for the AXA trades?

2 **A.** No.

3 **Q.** Do you know one way or the other whether they went to a
4 client or a custody bank?

5 **A.** I have no way of knowing that.

6 **Q.** Do you know what information, if any, would be on there
7 regarding markups or markdowns?

8 **A.** No, I wouldn't.

9 **Q.** You were asked some questions about the phone call on
10 March 2, 2011. Of all the people on that phone call, who was
11 the boss?

12 **A.** Ross McLellan.

13 **Q.** Was Edward Pennings on that call?

14 **A.** No.

15 **Q.** Was Richard Boomgaardt on that call?

16 **A.** No.

17 MR. JOHNSTON: Thank you. No further questions.

18 MR. GOLDSTEIN: Quickly, Your Honor.

19 **RECROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

20 BY MR. GOLDSTEIN:

21 **Q.** If a markup is added to a bond execution, you have to
22 produce another ticket; is that correct?

23 **A.** We'd have to produce two tickets regardless of whether
24 there was a markup or not.

25 MR. GOLDSTEIN: Thank you.

1 Your Honor, if I could, could I have the chalk
2 marked Exhibit B and have Mr. Clemmenson initial it?

3 THE COURT: Mark it for identification?

4 MR. GOLDSTEIN: Yes.

5 MR. JOHNSTON: Your Honor, we object.

6 THE COURT: You object to marking it for
7 identification?

8 MR. JOHNSTON: No. I'm sorry. I thought he said
9 move to admit.

10 THE COURT: You withdraw that, don't you?

11 MR. JOHNSTON: Yes.

12 THE COURT: You may approach, and you may have that
13 marked for identification.

14 (Exhibit No. B marked for identification.)

15 THE COURT: For identification, ladies and
16 gentlemen, means it's marked for the record and the Court.
17 Things that are in evidence you bring back with you to the
18 jury room. Things that are marked for identification are
19 just preserved in the record of the proceedings.

20 MR. GOLDSTEIN: Thank you, you Honor. No further
21 questions.

22 THE COURT: You're excused, sir. Thank you very
23 much.

24 Next witness.

25 MR. FRANK: Thank you, Your Honor. The government

1 calls Kristen Morris.

2 (Pause.)

3 (The witness was duly sworn.)

4 THE CLERK: Thank you.

5 **KRISTEN MORRIS**

6 having been duly sworn, testified as follows:

7 **DIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

8 BY MR. FRANK:

9 **Q.** Still morning. Good morning, Ms. Morris.

10 **A.** Good morning.

11 **Q.** Could you tell us where you live, please.

12 **A.** In Andover, Massachusetts.

13 **Q.** And where do you work?

14 **A.** State Street Bank and Trust.

15 **Q.** What do you do at State Street?

16 **A.** I'm a transition analyst on the transition management
17 desk.

18 **Q.** And how long have you worked at State Street?

19 **A.** About 22 years.

20 **Q.** And have you had pretty much the same job during most of
21 that time or have you had different jobs?

22 **A.** Most of the time, about 19 years, I've been on the
23 transition management desk.

24 **Q.** As an analyst?

25 **A.** As an analyst.

1 **Q.** I want to direct your attention to 2011. Do you have
2 that in mind?

3 **A.** Yes.

4 **Q.** Who did you report to in 2011?

5 **A.** Kevin Miller.

6 **Q.** And what was his job?

7 **A.** He was in charge of the transition management analyst
8 desk.

9 **Q.** In the United States?

10 **A.** In the United States, correct.

11 **Q.** And who did Kevin Miller report to?

12 **A.** He reported to Peter Weiner.

13 **Q.** And what was his job?

14 **A.** He was the head of the North American sales team.

15 **Q.** And who did Peter Weiner report to?

16 **A.** He reported to Ross McLellan.

17 **Q.** And what was his job?

18 **A.** He was in charge of -- globally of transition management.

19 **Q.** How many layers above you was Ross McLellan?

20 **A.** He was three layers above me.

21 **Q.** And when you started at State Street, did you know Ross
22 McLellan?

23 **A.** He and I started pretty much at the same time. I think I
24 started a couple of months maybe before he did.

25 **Q.** Okay. And yet, in 2011, you were a transition management

1 analyst and he was three layers above you.

2 **A.** Yes.

3 **Q.** And how senior was he at the bank?

4 **A.** He was just promoted to executive vice president, so he
5 was pretty senior.

6 **Q.** Tell us what your responsibilities were as a transition
7 analyst.

8 **A.** As an analyst, we worked on the day-to-day operations of
9 a transition, so we would coordinate between the various
10 parties, we would deal with the clients, the custodians, the
11 incoming managers. We worked on strategy and delivered trade
12 files to the trading desk.

13 **Q.** And when you say you delivered trade files to the trading
14 desk, what does that mean?

15 **A.** So we compared the assets that we were given and we
16 compare that to the target portfolio to determine what we
17 need to buy and what we need to sell. So then we take those
18 trades and we send them electronically up to the transition
19 trading desk.

20 **Q.** And do you send anything else to the traders?

21 **A.** That is followed with an e-mail with the instructions on
22 how to trade the portfolio.

23 **Q.** And what's included in those instructions?

24 **A.** It would have the account number, the -- when to start
25 trading, the value of the buy, the value of the sells, and

1 what the commission rates were.

2 **Q.** And you testified you provide that in an e-mail?

3 **A.** That's correct.

4 **Q.** Tell us a little bit about the layout. Where do you work
5 relative to where the traders work?

6 **A.** Sure. So myself and the other analysts, we work on the
7 trading floor. It's a long desk, almost like a long
8 dining-room table, and we sit either side of this desk. I'm
9 actually on the end of the desk, and next to me there's an
10 aisle that separates us from the next group of desks, which
11 one over and one up is the transition trading desk.

12 **Q.** So they're a few feet from you?

13 **A.** A stone's throw away, correct.

14 **Q.** Where, in this time period, did Ross McLellan sit?

15 **A.** He sat up on the sixth floor. It was overlooking the
16 trading desk, but it was one floor up.

17 **Q.** So he looked down on the trading desk?

18 **A.** Correct.

19 **Q.** When you would issue those e-mail instructions to the
20 traders, where did you get that information from?

21 **A.** For bigger deals, there's a strategy team that puts
22 together strategy documents that talks about how we're going
23 to trade the portfolio, which assets to trade first to reduce
24 the risk, how long the trade should be. So for larger deals,
25 we would get that direction from the strategy group. For

1 smaller deals, we would determine the instructions ourselves.

2 **Q.** And what about with respect to what to charge? Where did
3 you get that information from?

4 **A.** From the transition notice.

5 **Q.** The periodic notice?

6 **A.** Correct.

7 **Q.** How do you charge for transitions in the ordinary course?

8 **A.** So for equities, it's charged cents per share for U.S.
9 and Canadian equities. For international equities, it's
10 charged on basis points of notional value. On fixed income,
11 it's basis points of notional value or basis points of yield.
12 And on features contracts, it's by contract.

13 **Q.** I want to direct your attention to fixed income for a
14 moment. You testified there's basis points of value and then
15 there's basis points of yield.

16 **A.** Correct.

17 **Q.** What's the difference?

18 **A.** So basis points of yield takes into account the duration
19 and interest rates of the bond to determine what the
20 commission would be. Basis points of notional value is just
21 more of a linear equation. It's just the basis points times
22 the value of the bond to give you the commission rate.

23 **Q.** And if you charge somebody, call it half a basis point of
24 yield, is that more or less, typically, on a bond than half a
25 basis point of value?

1 **A.** Typically it's more.

2 **Q.** Why is that?

3 **A.** Just -- I don't know.

4 **Q.** Just mathematical?

5 **A.** From my experience, when we charge basis points of yield,
6 it's -- the -- it turns out to be -- the same number turns
7 out to be a higher commission dollar amount than the same
8 number of basis points of notional value.

9 **Q.** And is that because the longer the duration of the bond,
10 the longer you're applying that?

11 **A.** That's correct.

12 **Q.** Okay. And who applies those commissions?

13 **A.** They're applied on each individual trade by the traders.

14 **Q.** Who tells the traders what commissions to apply?

15 **A.** The transition analysts do.

16 **Q.** So it's somebody in your role?

17 **A.** Correct.

18 **Q.** What is your understanding of what that commission
19 covers?

20 **A.** That commission covers -- that's our only fee that State
21 Street makes on the trade. It would cover the analyst, the
22 traders, the operation group, the -- all the overhead.

23 **Q.** So no matter what entity is directing which entity to do
24 what, that's the fee that you charge?

25 MR. WEINBERG: Objection, leading.

1 THE COURT: Sustained as to the form.

2 BY MR. FRANK:

3 Q. You're aware that the trading desk is in a particular
4 entity and your desk may be in a different entity. Are you
5 aware of that?

6 A. That's correct.

7 Q. But there's one fee that's charged?

8 A. That's correct.

9 MR. WEINBERG: Objection, Your Honor.

10 THE COURT: Overruled.

11 BY MR. FRANK:

12 Q. And that fee -- what's your understanding of what that
13 covers, again?

14 A. That fee covers the transition analyst, the trading
15 teams, the operational teams, the account setup team, the
16 legal teams, general overhead.

17 Q. I want to direct your attention to March of 2011. Do you
18 recall working on a transition for a client called AXA?

19 A. I do.

20 Q. What was the nature of that deal?

21 A. It was a fixed-income trade. There were three different
22 portfolios, different groups of assets. It was a large
23 trade. It was about seven to eight billion dollars in total.

24 Q. How big a deal -- where does that rank in deals that
25 you've worked on?

1 **A.** It was a very big deal for me. It was probably one of
2 the top three deals I've worked on dollarwise.

3 **Q.** In your career?

4 **A.** In my career, correct.

5 **Q.** And what about for the desk? How big a deal was it for
6 the desk?

7 **A.** I think it was a pretty big deal for the desk as well.

8 **Q.** What, if anything, did you learn about the commission
9 that was to be applied to that deal?

10 **A.** I was told it was .1 basis points of yield.

11 **Q.** .1 basis points of yield?

12 **A.** Correct.

13 MR. FRANK: Could we take a look at Exhibit 102.1
14 in evidence, please.

15 **Q.** Do you recognize this document, Ms. Morris?

16 **A.** Yes. This is the strategy document.

17 **Q.** Is this also called a pretrade?

18 **A.** Looking at the front page, I think it's the pretrade
19 strategy document, correct.

20 MR. FRANK: And if we could look at page 9 of the
21 document, the first paragraph.

22 **Q.** So we've read the first two sentences. I want to direct
23 your attention to the sentence sort of in the middle of that
24 first paragraph, beginning with, "Many fixed-income trades."
25 Do you see that?

1 "Many fixed-income trades" --

2 Do you see that?

3 **A.** I do.

4 **Q.** -- "are conducted on a principal basis where the dealer
5 hides the actual cost (i.e., the dealer's profit) of the
6 trade. Clients are not aware of the costs, given the lack of
7 transparency in the fixed-income market. Our process puts
8 the investment community in competition for the bonds to see
9 who will pay the highest price for bonds we are selling and
10 offer bonds at the lowest price for bonds we are purchasing
11 for our clients."

12 Can you tell us what your understanding is of what
13 that means?

14 **A.** Sure. So we -- State Street did not take on principal
15 positions, meaning we did not buy bonds from the client and
16 hold them in our own account. So we worked as an agent. We
17 would go out and we would solicit the best bids or the best
18 offers for each of the securities we were trading, and then
19 we would execute at those best levels.

20 **Q.** And what about what the client would pay you for that?

21 **A.** So the client would pay a commission on that. And that
22 would be the only revenue that State Street would make on the
23 trade.

24 **Q.** Okay. And would that commission be agreed upon in
25 advance or not?

1 **A.** It would be agreed upon in advance, correct.

2 **Q.** And would it be disclosed or not?

3 **A.** It would be disclosed in the transition notice, correct.

4 **Q.** So it says here that many fixed-income trades are
5 conducted on a principal basis where the dealer hides the
6 cost, the dealer's profit on the trade. Do you see that?

7 **A.** I do.

8 **Q.** Did State Street do that, in your understanding?

9 **A.** No.

10 **Q.** Could we look at the next paragraph, please?

11 "State Street does not charge an explicit
12 management or project management fee for transition
13 assignments. State Street does not take a spread on any
14 transactions nor do we let any counterparty take a spread on
15 our clients' transactions. We do not engage in commission
16 sharing, revenue sharing, referral payments, and/or other
17 economic benefits that our firm or its affiliates receive as
18 a result of our transition management activities. Consistent
19 with our market-leading fiduciary-agency business model, our
20 commissions are fully disclosed to our clients around any
21 transition events undertaken. State Street's commission
22 revenues are made up of fully disclosed equity commissions,
23 fixed-income commissions, and futures contract commissions."

24 What's your understanding of what that means?

25 **A.** That State Street would disclose any commissions that we

1 made on any of the trades.

2 **Q.** And you used the word "commissions." What is your
3 understanding of what this means with respect to markups,
4 markdowns, or spreads?

5 **A.** So for fixed-income products, if we were trading on a
6 riskless principal basis, the commission would be either a
7 markup, markdown, or spread of the price. If we were trading
8 as an agent, it would be delineated out in the ticket itself.
9 But it would be the same commission either way.

10 **Q.** And what is this paragraph saying, in your understanding,
11 about that?

12 **A.** That we're fully transparent with the commissions that we
13 charge.

14 **Q.** And again, does that mean the same thing for markups,
15 markdowns, and spreads, in your understanding?

16 **A.** Correct. It would be the same thing whether it was as a
17 markup or as a -- delineated as an agent trade.

18 **Q.** And is this description that we've looked at on this page
19 consistent or inconsistent with the way State Street marketed
20 itself generally to clients?

21 **A.** It's consistent.

22 **Q.** Same across the board?

23 **A.** Correct.

24 MR. FRANK: Can we look at page 21, please?

25 **Q.** If we could look at that first paragraph, the last

1 sentence, it says, "The following table details the actions
2 we take in the transition process, in which at all times we
3 act as a fiduciary and never outsource our fiduciary duties."

4 What's your understanding of what that means, that
5 you always act as a fiduciary and never outsource your
6 fiduciary duties?

7 **A.** Sure. That we'll always act in the best interest of the
8 client. We'll put their interests ahead of State Street's
9 interests.

10 **Q.** I want to take a look at the column on the left, that
11 chart.

12 And if we look right in the middle, you see where
13 it says "finalize transition management agreement"?

14 **A.** Yes.

15 **Q.** What does that mean?

16 **A.** The transition management agreement is the agreement
17 between State Street and the client. So oftentimes there's
18 negotiations back and forth. This just means that before
19 trading begins we will finalize and have a contract executed.

20 **Q.** Okay.

21 Standard practice?

22 **A.** Correct.

23 **Q.** If we could take a look at page 26, please.

24 And if we could just take a look at the entry for
25 Friday, February 25th of 2011.

1 First of all, could you just tell us what this
2 calendar is?

3 **A.** Sure. One of the things that we do as transition
4 analysts is we'll put together a timeline to share with the
5 parties involved in the transition so that the custodian and
6 the managers and the clients know exactly what should happen
7 on each day. This is an example --

8 **Q.** A client would understand from this what's supposed to
9 happen?

10 **A.** Correct. It's not necessarily set in stone, but it's
11 generally what should happen on each day.

12 **Q.** If we look at Friday, February 25th of 2011, do you
13 see -- I think it's the second entry there. It says "SSGM TM
14 agreement finalized"?

15 **A.** Yes.

16 **Q.** What's your understanding of what that means?

17 **A.** That we would finalize the contract on that day.

18 **Q.** And that would be the bank's expectation?

19 **A.** Correct.

20 **Q.** Could we look at pages 6 through 8, please. Let's start
21 with 6.

22 You testified there were three portfolios involved
23 here?

24 **A.** Yes.

25 **Q.** Okay. So I'm showing you this part of the estimate for

1 the multimanager, multisector bond fund transition.

2 **A.** Okay.

3 **Q.** What are we looking at?

4 **A.** So this is the first page with some of the cost
5 information on it. The intimate -- implementation shortfall
6 is listed here for the trade.

7 **Q.** And this is the pretrade estimate?

8 **A.** Correct. It's a pretrade estimate.

9 **Q.** And if we look at the commission line, tell us what we're
10 looking at there.

11 **A.** Sure. So that's the expected commission for the trade.
12 In dollar terms, it's 95,438. Basis point terms, it's .57.

13 **Q.** When we are looking at that in .57, is that basis points
14 of yield or basis points of value?

15 **A.** That's basis points of value. That's the value -- that's
16 the ratio of the commission dollars over the value of the
17 portfolio.

18 **Q.** And how do you typically quote commissions to clients, in
19 terms of basis points of yield or basis points of value?

20 **A.** Commissions are calculated on basis points of yield to
21 come up with an aggregate dollar number, and then that dollar
22 number is relayed to clients in terms of basis points of
23 portfolio value.

24 **Q.** So internally you calculate it using basis points of
25 yield?

1 **A.** Correct.

2 **Q.** And then you quote it to the client this way in terms of
3 basis points of value?

4 **A.** That's correct.

5 **Q.** Do you have an understanding of what basis point of yield
6 figure was used to calculate this commission in terms of
7 basis points of value?

8 **A.** I believe it was .1 basis points of yield.

9 **Q.** Okay. So we're looking at, for the first portfolio, the
10 estimated cost was \$95,000, approximately?

11 **A.** Correct.

12 MR. FRANK: If we look at page 7, please. We're
13 now looking at the multimanager core bond fund transition.

14 **Q.** What's the commission number for this one?

15 **A.** 117,640.

16 **Q.** What was the basis point of the field figure that was
17 used to calculate this commission?

18 **A.** Again, I believe it was .1 basis points of yield.

19 **Q.** If we look at the next page, page 8, we're now looking at
20 the EQ core bond fund transition.

21 What's the total commission estimate here?

22 **A.** 379,222.

23 **Q.** What basis point of yield figure was used to calculate
24 this commission number?

25 **A.** Again, I believe it was .1 basis points of yield.

1 Q. So it's .1 across the board?

2 A. Yes.

3 Q. So why do the basis points of notion value fluctuate
4 slightly?

5 A. Because the value of each of the individual portfolios is
6 different.

7 Q. Okay. That's just what the denominator is?

8 A. Correct.

9 Q. Okay. And you've had an opportunity to review this
10 before, right?

11 A. I have.

12 Q. Have you had an opportunity to add up the numbers that we
13 looked at, 95,000, 117,000, and 379,000 in estimated
14 commissions?

15 A. Yes.

16 Q. And what does that add up to?

17 A. It's approximately 590,000.

18 Q. In your experience, would the rate used to calculate
19 these commissions change after a transition has been awarded?

20 A. It could if the client was renegotiating the commission
21 rate before the contracts were signed.

22 Q. What about in the absence of an agreement with the
23 client?

24 A. I'm sorry. Can you ask that question again?

25 Q. What about if the client didn't renegotiate?

1 **A.** Then it would be the same.

2 **Q.** Would the absolute dollar number change?

3 **A.** The absolute dollar number would change.

4 **Q.** Why is that?

5 **A.** It's dependent on the market value. Since it's
6 calculated on the principal value of the trade, if the market
7 value goes up, the dollar value goes up; conversely, if it
8 goes down, the dollar value goes down.

9 **Q.** How does .1 basis points of yield compare to the rate you
10 would traditionally charge for a bond transition?

11 **A.** It's a very low rate. Typically at the time we were
12 charging 1 basis point of yield.

13 **Q.** And did you charge 1 basis points of field typically for
14 any size bond transition?

15 **A.** To my memory --

16 **Q.** Or would it vary by size?

17 **A.** To my memory, most of them were at 1 basis point of
18 yield. Certainly for bigger transitions we would get more
19 aggressive and have lower commission rates.

20 **Q.** And again, how big was this transition relative to most
21 transitions?

22 **A.** It was a very big transition.

23 **Q.** You testified earlier that you typically would get the
24 information on what commissions you were charging from the
25 transition notice?

1 **A.** Correct.

2 **Q.** Is that what happened in this case?

3 **A.** No. There wasn't a transition notice in this case.

4 **Q.** Do you recall learning why there was no transition
5 notice?

6 **A.** To the best of my memory, I recall being told that -- for
7 this particular trade, SSGA, which is the money management
8 arm of State Street was the investment manager, and they were
9 changing their benchmark -- or the client wanted to change
10 their benchmark to a different benchmark. So SSGA was going
11 to be the manager after the transition as well. And since
12 the client had a contract with SSGA as investment manager,
13 that we didn't need to have a subsequent contract as a
14 transition manager.

15 **Q.** Who told you that?

16 **A.** I don't remember. It was either -- it would have either
17 been my boss, Kevin Miller, or the COO, Chris Carlin.

18 **Q.** And who did Chris Carlin report to?

19 **A.** He reported to -- I'm not sure actually.

20 **Q.** Okay. And Kevin Miller you testified earlier reported
21 to?

22 **A.** Peter Weiner.

23 **Q.** Who reported to?

24 **A.** To Ross McLellan.

25 **Q.** Okay.

1 And you testified about what was going on in the
2 portfolio. So it was moving from -- it was staying within
3 State Street Global Advisors?

4 **A.** Correct. Except for the time that it was being pulled
5 out for transition when it would reside under State Street
6 Global Markets.

7 **Q.** So you were reinvesting it in different assets and giving
8 it back to State Street Global Advisors?

9 **A.** That's correct.

10 **Q.** In your experience, how often did it happen that a deal
11 did not have a transition notice?

12 **A.** Not very often. This is really the only one I can
13 remember.

14 **Q.** And what about a transition management agreement?

15 **A.** Same thing.

16 **Q.** You don't remember any other times?

17 **A.** I don't remember any other times.

18 **Q.** Did you have occasion -- have you had occasion at State
19 Street to do other deals where you were transitioning a
20 portfolio within SSGA? In other words, where it started at
21 SSGA, you transition it, and then it goes back to SSGA.

22 **A.** Yes.

23 **Q.** And in those deals, is there typically an investment
24 management agreement with SSGA?

25 **A.** Yes, there is.

1 **Q.** And in those deals, typically do you have a transition
2 asset management agreement nonetheless?

3 **A.** Yes, we do.

4 **Q.** So even accounting for those deals, you don't recall any
5 other times?

6 **A.** I don't recall, no.

7 **Q.** Did there come a time when you learned that the plan
8 about how to charge AXA had changed?

9 **A.** No.

10 MR. FRANK: Well, let me show the witness only
11 Exhibit 114, please.

12 (Pause.)

13 **A.** I'm sorry. Yes.

14 So before the trading began, I got an e-mail from
15 Ross, saying that he had spoken to the trading desk and that
16 we'll charge on mortgages and treasuries but not other
17 fixed-income products.

18 **Q.** So I put in front of you a document. Do you recognize
19 that document?

20 **A.** Yes.

21 **Q.** What is it?

22 **A.** It's the e-mail that I just referenced from Ross McLellan
23 to me.

24 MR. FRANK: The government offers 114.

25 MR. WEINBERG: No objection.

1 THE COURT: Admitted.

2 (Exhibit No. 114 admitted into evidence.)

3 BY MR. FRANK:

4 Q. And so you just testified, but I'll read it for the
5 record. It says, from Mr. McLellan to you, on Wednesday,
6 March 2, "Spoke to desk on AXA comms."

7 What do you understand that to mean?

8 A. AXA commissions.

9 Q. "They are all set. Essentially we will chart on mort and
10 treasuries and not others."

11 What do you understand "mort" to refer to?

12 A. To mortgage securities.

13 Q. Is this consistent or inconsistent with how AXA was going
14 to be charged?

15 A. It was inconsistent. I previously understood it was
16 going to be .1 basis points of yield.

17 Q. Across the portfolio?

18 A. Across the board, correct.

19 Q. Does this e-mail tell you anything about what the rate is
20 going to be?

21 A. It does not.

22 Q. Just on which securities you're going to charge?

23 A. That's correct.

24 Q. Okay.

25 And if we just look up at the top, you forwarded

1 this to Kevin Miller?

2 **A.** Correct.

3 **Q.** Why did you do that?

4 **A.** Just FYI. He was my boss. I kept -- I wanted to keep
5 him in the loop of things that were going on.

6 **Q.** Did you have an understanding of why Mr. McLellan was
7 telling you that you were going to charge on mortgages and
8 treasuries and not others?

9 **A.** No.

10 **Q.** Prior to this deal, how often did you receive
11 instructions from Mr. McLellan about what to charge on a deal
12 once it had been awarded?

13 **A.** Not -- I don't remember much -- many times, if any, other
14 than this one.

15 **Q.** This is the only one you remember?

16 **A.** Right. He would instruct us prior to the deal being run.
17 If we were running a pretrade, he would tell us how much he
18 wanted to charge for the pretrade but --

19 **Q.** But not after?

20 **A.** But not after.

21 **Q.** And whose job was it to instruct traders how much to
22 charge?

23 **A.** It was a transition analyst.

24 **Q.** Your job?

25 **A.** Yes.

1 **Q.** Prior to this deal, how often do you recall Ross McLellan
2 instructing traders on your deals how much to charge?

3 **A.** I don't recall any other deals.

4 **Q.** Never happened?

5 **A.** Not that I can recall.

6 MR. FRANK: Could we show the witness Exhibit 115.
7 Is this in evidence?

8 **Q.** Do you see that in front of you?

9 **A.** I do.

10 **Q.** What is it?

11 **A.** It's the letter of direction that AXA -- I'm sorry.

12 It's an e-mail from me to my colleagues where I'm
13 forwarding a copy of the letter of direction and the
14 service-level documents that SSGA had provided to us that
15 discussed the fact that AXA knew that we were taking over the
16 transition of the portfolio from SSGA.

17 MR. FRANK: The government offers 115 and its
18 attachment.

19 MR. WEINBERG: No objection.

20 THE COURT: Admitted.

21 (Exhibit No. 115 admitted into evidence.)

22 BY MR. FRANK:

23 **Q.** So you testified that this e-mail attaches a letter of
24 direction. Is that referred to as an LOD?

25 **A.** That's correct.

1 **Q.** What is a letter of direction?

2 **A.** It's instructions from the client to an investment
3 manager about some purpose for one of their portfolios.

4 **Q.** Basically telling them State Street Global Markets is
5 going to transition this for us?

6 **A.** Correct.

7 **Q.** And is it typical to have these?

8 **A.** It's typical for clients to send letters of direction to
9 investment managers.

10 **Q.** And who was the investment manager here?

11 **A.** SSGA, State Street Global Advisors.

12 **Q.** Is this letter of direction a substitute for a transition
13 management agreement?

14 MR. WEINBERG: I object.

15 BY MR. FRANK:

16 **Q.** In your understanding.

17 **A.** No.

18 THE COURT: Hold on. You still object?

19 MR. WEINBERG: Yes. There needs to be a predicate
20 for the understanding, Your Honor.

21 THE COURT: Overruled.

22 You can answer.

23 **A.** I'm sorry. Can you ask the question again?

24 **Q.** In your understanding, is a letter of direction a
25 substitute for a transition management agreement?

1 **A.** No. It's just the letter of direction to the investment
2 manager.

3 **Q.** Is it a substitute for a periodic notice, in your
4 understanding?

5 **A.** No.

6 **Q.** Does it contain any terms of the deal?

7 **A.** It does not, no.

8 MR. FRANK: Could we show the witness Exhibit 206,
9 please?

10 **Q.** Do you recognize this document? We'll blow it up for
11 you.

12 **A.** Yes. This is an example of an e-mail that I would send
13 to the trading desk with the details and instructions for a
14 trade. This was for the AXA trade, discussed the three
15 portfolios and the fact that I had sent the trades to the
16 desk and what the commission rate was.

17 **Q.** These are an example of trade instructions?

18 **A.** Correct.

19 MR. FRANK: The government offers 206.

20 MR. WEINBERG: No objection.

21 THE COURT: Admitted.

22 (Exhibit No. 206 admitted into evidence.)

23 BY MR. FRANK:

24 **Q.** And this you sent on Friday, March 4, 2011, and you said,
25 "Hi, all. Attached please find the trades for AXA for

1 Monday."

2 So you were going to start trading the following
3 Monday, March 7th?

4 **A.** That's correct.

5 **Q.** And then you say below that, "Commission is .1 basis
6 points of yield." Do you see that?

7 **A.** Correct, I do.

8 **Q.** Why did you put that there?

9 **A.** Because that was my understanding that was the commission
10 rate to be charged for that trade.

11 **Q.** Now, earlier we looked at an e-mail you had received from
12 Mr. McLellan, telling you that he had instructed the traders
13 to charge on mortgages and treasuries and not others. Do you
14 recall that?

15 **A.** I do.

16 **Q.** But you didn't put that in this instruction e-mail to the
17 traders.

18 **A.** No, I did not.

19 **Q.** Why not?

20 **A.** My job was just to let them know what the commission rate
21 was for the trade. If he had other conversations with him,
22 that was his conversation, and I didn't -- I wasn't privy to
23 all that information.

24 **Q.** Did there come a time when you revised the pretrade
25 estimate for AXA?

1 **A.** I did. There --

2 **Q.** Why?

3 **A.** Typically when we do a transition, we'll first run a
4 pretrade which just generally gives an idea of the cost and
5 the timing and the liquidity for the clients. And then right
6 before the trade happens, we'll run a final pretrade version,
7 so that would incorporate any changes made to the portfolio
8 as well as updated market environment conditions.

9 MR. FRANK: Okay. Could we look at 119.1 in
10 evidence, please?

11 Actually, before we look at 119.1, I'm sorry, can
12 we look at the cover e-mail which is also in
13 evidence?

14 **Q.** You said, "Hi, all, attached please find the pretrade
15 reports for the EQ core and multisector portfolios."

16 Why did you just send those two?

17 **A.** So taking a look back through my e-mails, I see that we
18 had received revisions on one of the portfolios from SSGA
19 right before trading was getting ready to commence. So the
20 two portfolios we were ready to begin trading and we had to
21 continue working on the pretrade and trade details for the
22 third.

23 **Q.** And you wrote, "The in-kinds have gone up in both cases."

24 What did you mean by that?

25 **A.** So in-kinds are positions that we start with that we can

1 also use in the eventual target allocation. So those are
2 positions that don't have to be traded. We literally earmark
3 them as in-kinds and move them over to the new target
4 allocation.

5 **Q.** What does that mean for trading commissions?

6 **A.** So if the in-kinds go up, it generally means that less
7 trading is required, so the commissions would generally go
8 down.

9 **Q.** Because you're not charging for the in-kinds?

10 **A.** There's no charge for the in-kind.

11 MR. FRANK: If we could look at page 2 of the
12 attachment, please.

13 **Q.** And if we look at the top left corner, this is the final
14 pretrade estimate for the AXA multisector portfolio. Do you
15 see that?

16 **A.** I do.

17 **Q.** And the commissions are 73,747?

18 **A.** Yes. Estimated commissions are 73,747 or .45 basis
19 points.

20 **Q.** Basis points of what?

21 **A.** Basis points of portfolio value.

22 **Q.** And what value did you use to calculate that commission?

23 **A.** I believe it was .1 basis points of yield.

24 **Q.** So the same that we saw earlier?

25 **A.** Correct.

1 Q. But there's just less trading?

2 A. Correct.

3 MR. FRANK: And if we look at the next attachment,
4 and if we also look at page 2.

5 Q. And you see that the estimate here is 268,000?

6 A. Correct.

7 Q. And it's .4 basis points?

8 A. That's correct.

9 Q. And that's of notional value or of yield?

10 A. Of notional value.

11 Q. And what value was used to calculate that?

12 A. .1 basis points of yield.

13 Q. Same value?

14 A. Correct.

15 Q. That didn't change?

16 A. That didn't change.

17 MR. FRANK: And if we could look at 121.1 in
18 evidence, please. The next -- actually, 121.2.

19 Q. Do you recall sending the third estimate a little bit
20 later that day?

21 A. I do, yes.

22 MR. FRANK: Okay. If we could look at page 2.

23 Q. And what are the commissions here?

24 A. 90,318, or .44 basis points of portfolio value.

25 Q. And what value did you use to calculate that?

1 **A.** .1 basis points of yield.

2 **Q.** And so if we add up -- again, did you have an opportunity
3 before you came to court today to add up the three values we
4 just looked at?

5 **A.** I did.

6 **Q.** Approximately 90,000, approximately 73,000, and
7 approximately 268,000?

8 **A.** Yes.

9 **Q.** What did that add up to?

10 **A.** Approximately 431,000.

11 **Q.** So commissions from the initial pretrade of 591,000 to
12 the final pretrade of 431,000, if my math is correct, went
13 down by 160,000 approximately?

14 **A.** Approximately, correct.

15 **Q.** In the ordinary course -- let me just ask you.

16 You testified that you used .1 basis points of
17 yield in this calculation?

18 **A.** I did.

19 **Q.** Would .5 basis points of yield have changed this result?

20 **A.** Yes.

21 **Q.** What would have happened?

22 **A.** I would imagine it would multiply it by five.

23 **Q.** Gone up by five?

24 **A.** Correct.

25 **Q.** And what if you charged .5 basis points of yield on the

1 bulk of the portfolio and zero on a small part of the
2 portfolio? Would the number still have gone up?

3 **A.** I'm sorry. Can you repeat that question?

4 **Q.** If you charged .5 on most of the portfolio --

5 **A.** Okay.

6 **Q.** -- zero on a small portion of the portfolio, what's your
7 understanding of what would have happened to the number?

8 **A.** I believe it would have gone up.

9 **Q.** It would have gone up.

10 In the ordinary course, do you trade bonds at State
11 Street as riskless principal or as agent?

12 **A.** Well, I don't trade the bonds myself --

13 **Q.** I understand.

14 **A.** -- but State Street generally trades them -- at that
15 time, we traded as riskless principal.

16 **Q.** And what is the difference, in your understanding?

17 **A.** It's really an operational difference. It's how the
18 trades are booked. So when you're trading as agent, the
19 commission is delineated out on each individual trade. When
20 you're trading as riskless principal, the commission is -- is
21 in the net pricing of the bonds. But it's the same number
22 either way.

23 **Q.** Okay. So it's just an operational difference?

24 **A.** Correct.

25 **Q.** When do you typically trade bonds as agent?

1 **A.** At the time, I remember when SSGA was the incoming
2 manager, oftentimes we would trade them as agent.

3 **Q.** Now, in this deal, SSGA was the incoming manager?

4 **A.** Correct.

5 **Q.** Do you have an understanding of whether you traded as
6 agent or as riskless principal?

7 **A.** We traded as riskless principal.

8 **Q.** Do you know why?

9 **A.** I don't know why. I did see e-mails recently --

10 THE COURT: If you don't know why, you don't know.

11 BY MR. FRANK:

12 **Q.** That's fine. You don't know why?

13 **A.** I don't know why.

14 **Q.** But the upshot of that would be that the price would be
15 reported to the client on a net basis?

16 **A.** I'm sorry. Can you repeat that?

17 **Q.** The price would be reported to the client on a net basis
18 if you traded as riskless principal?

19 **A.** Correct.

20 **Q.** The commission wouldn't be separately broken out?

21 **A.** It would not be, as riskless principal.

22 MR. FRANK: Could we look at Exhibit 122 in
23 evidence, please?

24 **Q.** What are we looking at here, Ms. Morris?

25 **A.** So Greg Spyropoulos was one of our fixed-income traders.

1 Here, he is sending me details of the execution for that
2 particular day, along with some trading commentary or market
3 commentary.

4 MR. FRANK: And if we could look at the attachment
5 in evidence and look at page 2, and if we could just enlarge
6 the lower half of the page.

7 Q. Do you typically look at this document in the ordinary
8 course, Ms. Morris?

9 A. I do see it, but typically we were using this information
10 to load into the macros that we used to run the client
11 reports.

12 Q. And so would you look at the commissions that were
13 applied in the ordinary course?

14 A. I wouldn't look specifically at them, no.

15 Q. Would you be able to know, if you had looked at them,
16 what rate had been used to come up with them?

17 A. Not just by glancing at the spreadsheet, no.

18 Q. Why is that?

19 A. As I said, when you're trading on basis points of yield,
20 it takes into account the bond's duration and interest rate,
21 so it's not a linear equation.

22 Q. Complicated calculation?

23 A. Correct.

24 Q. And again, you testified that on a -- when you're
25 reporting to the client as riskless principal, it would be on

1 a net basis, correct?

2 **A.** Correct.

3 **Q.** So would the client see these commissions in its
4 reporting?

5 **A.** No.

6 MR. FRANK: Can we look at Exhibit 140, and I think
7 just for the witness only.

8 **Q.** Do you recognize this document?

9 **A.** I do.

10 **Q.** What is it?

11 **A.** It's an e-mail that I sent to my colleagues. I sent it
12 to Ross McLellan and Kevin Miller and Kevin Walker, letting
13 them know that the final post-trade wrap-up was just about
14 complete, asking them --

15 **Q.** I'm going to cut you off right there. I apologize.

16 MR. FRANK: The government offers 140.

17 MR. WEINBERG: No objection.

18 THE COURT: Admitted.

19 (Exhibit No. 140 admitted into evidence.)

20 BY MR. FRANK:

21 **Q.** You testified you sent this to Mr. McLellan?

22 **A.** To Mr. McLellan and Kevin Miller and Kevin Walker.

23 **Q.** And you said, "Hi. The AXA post-trade is just about
24 complete. The post-trade is on the shared drive under the
25 following," and then you sent a link.

1 What are you telling them?

2 **A.** Where the post-trade is located on the shared drive.

3 **Q.** Why are you telling them that?

4 **A.** I was asking them to review it to see if they had any
5 corrections or any additions they wanted to make the
6 post-trades.

7 **Q.** Why were you sending this to Mr. McLellan?

8 **A.** Just because it was a big trade and I knew he was
9 involved early on.

10 **Q.** And why were you sending it to Mr. Walker?

11 **A.** Because he was the salesperson on the trade.

12 MR. FRANK: And could we show the witness only
13 Exhibit 141, please?

14 **Q.** Do you recognize this document?

15 **A.** So this is -- I do, yes.

16 **Q.** What is it?

17 **A.** This is an e-mail from Kevin Walker to me, a response to
18 that e-mail that I had sent out asking for my colleagues to
19 review the documents.

20 MR. FRANK: The government offers 141.

21 MR. WEINBERG: No objection.

22 THE COURT: Admitted.

23 (Exhibit No. 141 admitted into evidence.)

24 BY MR. FRANK:

25 **Q.** Mr. Walker says to you, "Looks good. Ross thought it

1 looked good, too."

2 What did you understand him to be telling you
3 there?

4 **A.** That he had reviewed the post-trade and that he thought
5 it looked good generally, that Ross had looked at it and he
6 thought it looked good, too.

7 **Q.** By "Ross," who did you understand him to be referring to?

8 **A.** Ross McLellan.

9 **Q.** Then I want to direct your attention to the last
10 sentence. He says, "One question is, I am wondering if the
11 lack of a commission figure is going to invite further
12 questions? I would say probably most definitely!"

13 What did you understand him to mean by that?

14 **A.** At the time, there was not -- at the time, our
15 fixed-income report did not have commission dollars listed as
16 a separate line on the post-trade.

17 **Q.** So what did you understand him to be saying when he said,
18 "I'm wondering if the lack of a commission figure is going to
19 invite further questions?"

20 **A.** I think that he was saying that since there was not a
21 commission figure on the post-trade that the client was going
22 to wonder what the commissions were.

23 **Q.** And if I could direct your attention to the response at
24 the top of the page.

25 You said in the second sentence, "I will also make

1 the other changes -- thanks for catching those. Re
2 commissions: Do we want to send out as is?"

3 Do you see that?

4 **A.** I do.

5 **Q.** Do you recall getting a response to that?

6 **A.** I don't, no.

7 **Q.** Do you recall sending out the post-trade?

8 **A.** I do.

9 **Q.** Do you recall whether you added any discussion of
10 commissions?

11 **A.** I don't believe I did, no.

12 MR. FRANK: Could we show the witness 143? Is this
13 in evidence?

14 Could we show the witness 143, please?

15 **Q.** Do you recognize this?

16 **A.** I do.

17 **Q.** What is it?

18 **A.** So this is the e-mail I sent to the client, AXA, with the
19 post-trade reports attached to it.

20 **Q.** Okay. And you say, "Attached please find State Street's
21 post-trade reports for the fixed-income transition."

22 Do you see that?

23 **A.** I do.

24 MR. FRANK: The government offers 143 and its
25 attachment.

1 MR. WEINBERG: No objection.

2 THE COURT: Admitted.

3 (Exhibit No. 143 admitted into evidence.)

4 BY MR. FRANK:

5 Q. And if we could look at page 3 of the post-trade under
6 "Trading Recap." I want to direct your attention to the
7 third sentence. It says, "The transition went quite well
8 with the overall costs coming in at 12.26 basis points, right
9 around our mean expected costs of 11.98 basis points."

10 Do you see that?

11 A. I do.

12 Q. What are you telling the client there?

13 A. So when we do the pretrade analysis, we set forth what we
14 think our mean expected costs are, and then we put a one
15 standard deviation band around that. Ideally we would like
16 to come in close to the mean. I'm telling the client here
17 that we came in at just .28 basis points higher than the
18 mean, so it was a good result.

19 Q. Good result. Do you recall what your client's reaction
20 was?

21 A. I don't.

22 Q. Would there be any way from this report for the client to
23 know what it had actually been charged in commissions?

24 A. I'm sorry. Can you repeat that?

25 Q. In your understanding, would there be any way for the

1 client to know from this post-trade report that you sent what
2 it had actually been charged in commissions?

3 **A.** No.

4 **Q.** And if the client had been charged a lower commission
5 rate, what is your understanding of what that would have
6 meant for the implementation shortfall?

7 **A.** A lower commission rate would have meant that the
8 implementation shortfall would have been even lower.

9 **Q.** Better result for the client?

10 **A.** A better result for the client, correct.

11 MR. FRANK: Can we show the witness only Exhibit
12 153, please? Actually, the top e-mail.

13 **Q.** Do you recognize this document?

14 **A.** I do.

15 **Q.** What is it?

16 **A.** It's an e-mail I had sent out to Chris Carlin and Kevin
17 Miller, letting them know I had updated the results. And
18 TIM -- that's our transition information management system
19 that records all of the costs and the performance of the
20 trades that we do --

21 **Q.** Let me just stop you right there for a moment.

22 MR. FRANK: The government offers 153.

23 MR. WEINBERG: No objection.

24 THE COURT: Admitted.

25 (Exhibit No. 153 admitted into evidence.)

1 **Q.** What are you telling Mr. Carlin and Mr. Miller about the
2 AXA revenues?

3 **A.** That the total revenue was 1,296,216.

4 **Q.** And how did that compare with what you had told the
5 client in the final pretrade?

6 **A.** It was much higher.

7 **Q.** How much higher?

8 **A.** About 900,000.

9 **Q.** About three times as high?

10 **A.** Between two and three times as high. Correct.

11 **Q.** It was 430,000?

12 **A.** Correct. Sorry. About three times as high.

13 **Q.** Was the first time you learned that the commissions that
14 had been charged to AXA exceeded what you had told the client
15 in the final pretrade?

16 **A.** No. I remember learning about it earlier in the trade.

17 **Q.** Tell us about that.

18 **A.** So at the time, we were -- when we had fixed-income
19 trades, the fixed-income products were a little bit -- they
20 were not as easy to pull into our updates as the equities
21 were. So I had a colleague of mine helping me pull the
22 information into the reports, and he was much better at
23 identifying issues when positions were kicking out or
24 whatnot. So anyway, he had at one point said, Hey, the
25 commissions in this trade are much higher than they were on

1 the pretrade.

2 **Q.** And what happened?

3 **A.** I believe that I had raised that up to somebody else,
4 whether it would have been my boss, Kevin Miller, or Kevin
5 Walker, just to let them know what was going on.

6 I know that no corrective action was taken, so I
7 believe I was given some type of answer that let me know that
8 what we were doing was fine and to continue with the process.

9 **Q.** But you don't remember specifically what you were told?

10 **A.** I don't remember specifically, no.

11 MR. FRANK: Could we show the witness only
12 Exhibit 125, please?

13 **Q.** Do you recognize this document?

14 **A.** I do.

15 **Q.** What is it?

16 **A.** It's an e-mail communication letting everyone know that
17 Ross had been -- Ross McLellan had been promoted to executive
18 vice president.

19 **Q.** What's the date?

20 **A.** March 10, 2011.

21 MR. FRANK: The government offers 125.

22 MR. WEINBERG: No objection, Your Honor.

23 THE COURT: Admitted.

24 (Exhibit No. 125 admitted into evidence.)

25 BY MR. FRANK:

1 **Q.** March 10, 2011, that Thursday, was that four days after
2 you started trading on the AXA deal?

3 **A.** It was.

4 **Q.** Directing your attention to the first two paragraphs. It
5 says, "Each year, during the annual senior-level promotion
6 process, candidates for promotion to leadership roles are
7 evaluated against a specific and predetermined set of
8 criteria, including business results, strategic thinking,
9 leadership, collaboration, globalism, character, and
10 managerial influence. Following this rigorous promotions
11 process, I am pleased to announce that Ross McLellan has been
12 promoted to executive vice president.

13 "During Ross' 14-year tenure at State Street, he
14 has made outstanding contributions to global markets and to
15 our Portfolio Solutions Group, which includes leading the
16 world's largest transition management business. Following
17 his promotion to head of the global portfolio solutions
18 business in 2009, Ross led transition management to a record
19 year in 2010 with strong year-on-year revenue growth."

20 Do you see that?

21 **A.** I do.

22 **Q.** How did \$1.3 million compare with what you earned on a
23 typical deal?

24 MR. WEINBERG: I object.

25 THE COURT: Overruled -- I'm sorry. Sustained.

1 There's not really evidence of what's a typical deal.

2 MR. FRANK: Well, she's testified --

3 THE COURT: You need a different kind of question,
4 I think, than that.

5 BY MR. FRANK:

6 Q. How did the size of this deal compare with the typical
7 deal?

8 A. It was much larger than the typical deal.

9 Q. And how did the \$1.3 million in revenue you earned on
10 this deal compare with what you earned on the typical deal?

11 A. It was one of the larger revenue deals.

12 Q. And who gave directions to the traders on what to charge
13 on this deal?

14 A. I gave directions in the e-mail and Ross had subsequent
15 conversations.

16 MR. FRANK: Thank you. No further questions.

17 THE COURT: Cross-examination, Mr. Weinberg?

18 MR. WEINBERG: Thank you, Your Honor.

19 **CROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

20 BY MR. WEINBERG:

21 Q. Good afternoon, Ms. Morris.

22 A. Good afternoon.

23 Q. I want to make sure we finish by 1:00.

24 The last document that Mr. Frank showed you was
25 dated March 10 and announced the promotion of Ross McLellan,

1 correct?

2 **A.** Correct.

3 **Q.** Referencing his accomplishments in 2010 and before?

4 **A.** Correct.

5 **Q.** There's nothing in that document regarding the decision
6 by State Street to promote him that has any relationship to
7 the AXA transition, is there?

8 **A.** I'm sorry. Can you repeat that?

9 **Q.** There's nothing in that document that in any way shows a
10 cause and effect between AXA, the trading that was going on
11 in March of 2011, and the decision by State Street Bank to
12 promote him based on his performance and his ability and his
13 commitment to the bank for the years preceding 2011; is that
14 correct?

15 **A.** There was nothing in that document that related -- that
16 said it related to the AXA transition.

17 **Q.** And you don't know whether the decision to promote him
18 was made many weeks before the AXA transition even began, do
19 you?

20 **A.** Oh, I have no idea when the decision was made.

21 **Q.** It was announced on March 10, 2011?

22 **A.** Correct.

23 **Q.** Presumably made beforehand, correct?

24 **A.** Presumably, correct.

25 **Q.** And you worked with Ross for many years, did you not?

1 **A.** I did.

2 **Q.** Respected him?

3 **A.** I did.

4 **Q.** Hardworking?

5 **A.** Yes.

6 **Q.** Intelligent?

7 **A.** Yes.

8 **Q.** Created a respectful relationship between you and he?

9 **A.** I'm sorry. Can you repeat that?

10 **Q.** It was a respectful relationship between you and he?

11 **A.** Yes.

12 **Q.** That he was respected by others in the community that you
13 worked, which is the State Street Global Markets?

14 **A.** Yes, he was.

15 **Q.** The government has shown you post-trades and made the
16 point that the client couldn't see from the post-trade what
17 the commissions were, correct?

18 **A.** Correct.

19 **Q.** Is that unusual?

20 **A.** At the time, no.

21 **Q.** At the time, the routine and practice of State Street,
22 whether it was AXA or some other client, was to give them a
23 post-trade that didn't break out what State Street made from
24 its work and performance and executions of trades and the
25 overall cost to the client, correct?

1 **A.** So at the time, our equity post-trades broke out the
2 commission; but at the time, the fixed-income post-trades did
3 not break out the commission.

4 **Q.** And that was because, if you know, the rules and
5 regulations for broker-dealers in the United States required
6 the breakout of equity commissions but did not require the
7 breakout of bond commissions unless it was an ERISA client?

8 MR. FRANK: Objection, foundation.

9 THE COURT: Why don't you establish the foundation
10 first. Sustained.

11 BY MR. WEINBERG:

12 **Q.** Do you know whether or not the decision by State Street
13 as a routine and practice in 2010, 2011 not to break out the
14 commissions for clients on bonds but to break them out on
15 stocks was because that's what the rules required, the FINRA
16 rules or the SEC rules?

17 **A.** I don't know what the rules were, no.

18 **Q.** But you could tell us, that is the routine across the
19 board. 2010, the norm was not to break out the commissions
20 from the overall costs for the clients in post-trades,
21 correct?

22 **A.** For transition management, correct.

23 **Q.** You worked only in the United States, correct?

24 **A.** I spent some time in Australia.

25 **Q.** Okay. You didn't work in London, correct?

1 **A.** I did not, no.

2 **Q.** So you had no personal involvement or experience in the
3 transition management practices in the U.K., correct?

4 **A.** No. I've never visited the U.K.

5 **Q.** So you would not, therefore, know whether or not markups
6 or even transition management fees were charged to U.K. or
7 European clients in contrast to the United States where the
8 norm was commission, correct?

9 **A.** Correct. I don't know the difference between what
10 happened in the U.K. versus the U.S.

11 **Q.** Although it was transition management, U.S. transition
12 management, Asia transition management, Europe, these were
13 really three separate silos that Mr. McLellan managed,
14 correct?

15 **A.** Correct.

16 **Q.** In other words, you aren't trained in U.K. law, and you
17 have no reason to believe the U.K. transition managers were
18 trained in U.S. law?

19 **A.** I wouldn't know, no.

20 **Q.** Exhibit 119 was an e-mail that you sent out to --

21 MR. WEINBERG: If we can pull that up. Thank you.

22 **Q.** This is March 7, and it's part of your sending the second
23 pretrade estimate out because there have been changes by AXA
24 in terms of what you were buying and selling, correct?

25 **A.** There were changes by the State Street Global Advisors

1 portfolio managers. But, yes, there were changes.

2 **Q.** So this transition had a lot of people involved in it,
3 did it not?

4 **A.** It did have a lot of people. Typically transitions do.

5 **Q.** Right. But this one also had State Street Global
6 Advisors, correct?

7 **A.** As both the legacy manager and the incoming manager,
8 correct.

9 **Q.** The legacy manager and the incoming manager were both
10 State Street Global Advisors, correct?

11 **A.** Correct.

12 **Q.** State Street Global Markets was chosen to do the
13 transition for the State Street Global Advisors client,
14 correct?

15 **A.** Correct.

16 **Q.** And State Street Global Advisors personnel were involved
17 in taking a look at how the transition was going, correct?

18 MR. FRANK: Objection to what they were doing.

19

20 BY MR. WEINBERG:

21 **Q.** To the extent you remember.

22 THE COURT: Overruled, to the extent you know.

23 **A.** I'm sorry. Can you repeat the question?

24 **Q.** Some of the State Street Global Advisors people had some
25 communications with some of the State Street Global Markets

1 people about the transition?

2 MR. FRANK: Objection, foundation.

3 MR. WEINBERG: If you know.

4 THE COURT: Overruled.

5 You can answer the question.

6 **A.** I'm sorry. Can you repeat that question one more time?

7 **Q.** Sure. You talked to some of the State Street Global
8 Advisors people during the course of this transition about
9 how it was going, did you not?

10 **A.** I did.

11 **Q.** And you were aware that State Street Global Advisors had
12 a lawyer named Lance Dial that was involved in looking at the
13 transition; is that correct?

14 **A.** I see that his name was on some e-mails that I had seen,
15 but I didn't have any personal involvement so I don't know
16 what he did or didn't do.

17 **Q.** Were you aware that AXA was not an ERISA client?

18 MR. FRANK: Objection, foundation.

19 THE COURT: Overruled.

20 **A.** I was.

21 **Q.** And if ERISA clients, if you know, were entitled to
22 greater disclosure than non-ERISA clients?

23 MR. FRANK: Foundation.

24 THE COURT: Overruled. If you know.

25 **A.** I'm not sure.

1 **Q.** But you do recall you've seen e-mails in your preparation
2 for today that demonstrate AXA was not an ERISA client?

3 MR. FRANK: Objection, hearsay.

4 THE COURT: Just as to the e-mails.

5 You can ask whether she knows whether it was an
6 ERISA client or not, but I think you already asked her that.

7 BY MR. WEINBERG:

8 **Q.** Let me show you a document and try to make it quicker.

9 MR. WEINBERG: Could we have 496 just for the
10 witness?

11 **Q.** Is this an e-mail that you received back on March 1
12 before the trading?

13 MR. FRANK: Objection to the form.

14 THE COURT: Overruled.

15 **A.** This is an e-mail that I received on March 1.

16 MR. WEINBERG: I would move for its admission, Your
17 Honor.

18 MR. FRANK: No objection.

19 THE COURT: Admitted.

20 (Exhibit No. 496 admitted into evidence.)

21 BY MR. WEINBERG:

22 **Q.** Lance Dial of SSGA legal has raised with Mellissa that we
23 have a 17-e-1 (commissions with an affiliated broker-dealer
24 issue).

25 Do you recall being told that?

1 **A.** I recall -- I don't necessarily recall it, but I have
2 seen this e-mail. It's been a while.

3 **Q.** I know. It's several years ago, and I understand that
4 you wouldn't recall the exact words.

5 But having read this, does this ring a bell that
6 this is a concept that you were told back seven years ago?

7 **A.** It does ring a little bell, yes.

8 **Q.** "And that we will have to sign a certification letter
9 representing to AXA that our commissions are reasonable and
10 fair and that the commission charged is at least as favorable
11 as that given to comparable customers."

12 Is that the content of what Mr. Carlin is telling a
13 series of people, including Ross McLellan, Peter Weiner,
14 Kevin Walker, yourself?

15 **A.** Yes.

16 **Q.** And then it continues, You do not have to trade these --
17 I guess there's a call now that may come up. And then you do
18 not have to trade these as agent, as this is a 40 Act fund
19 and not ERISA.

20 Do you know what a 40 Act fund is?

21 **A.** I have a general sense of what a 40 Act fund is.

22 **Q.** And what is your general understanding?

23 **A.** It's an insurance company fund or a mutual fund.

24 **Q.** So Mellissa is Ms. Mellissa McKay, an attorney for State
25 Street Global Markets, if you know?

1 **A.** That was my understanding in reading it, but I don't know
2 for sure.

3 **Q.** If that understanding is correct, then there's at least
4 been conversations with Lance Dial, an attorney for SSGA,
5 Mellissa McKay, an attorney for SSGM, global markets, rather
6 than the adviser. And they're talking about the standards
7 for charging AXA must meet 17-e-1 and, B, in the words of
8 this e-mail, reasonable and fair and at least as favorable as
9 that given to comparable customers, correct?

10 MR. FRANK: Objection to what lawyers are talking
11 about that she's not a party to.

12 THE COURT: You can ask for her understanding.

13 BY MR. WEINBERG:

14 **Q.** Is that your understanding?

15 **A.** I'm sorry. Can you repeat the that question?

16 **Q.** Yes. There were two lawyers involved -- is it your
17 understanding, based on this e-mail, that there were lawyers,
18 first the adviser from State Street, lawyer for the
19 broker-dealer for State Street, and that they're
20 discussing -- and this e-mail is from Mr. Carlin -- about
21 17(e) (1) and its requirement that the fees charged by State
22 Street Global Markets to AXA be, quote, reasonable and fair
23 and at least as favorable as that given to comparable
24 customers.

25 **A.** That would be my understanding in reading this, yes.

1 **Q.** And that State Street is going to have to certify that as
2 a fact that the fees were fair and reasonable, correct?

3 **A.** That's what this seems to say, yes.

4 **Q.** And these were very low fees, correct?

5 **A.** These were very --

6 **Q.** Very comparably low fees. Whether it's 1/10 of a basis
7 point of yield or 2/10 of a basis point of yield, this is
8 well below what other customers were ordinarily charged for
9 fixed-income transactions in 2010?

10 **A.** .10 basis points of yield was much lower than other
11 clients were charged back then.

12 **Q.** And this was a challenging transition, was it not?

13 **A.** Yes, it was.

14 **Q.** Lots of moving pieces and pressure on State Street Global
15 Markets to do it in accordance with the strict and expedited
16 time schedule, correct?

17 **A.** That's correct.

18 **Q.** And it was unique to you in that there was no contract.

19 **A.** That's correct.

20 **Q.** In all your years of being a transition management
21 analyst, you've never done a transition, small or huge like
22 this one, without a transition management contract?

23 **A.** Not that I can remember, correct.

24 **Q.** Or a periodic notice or a transition notice, correct?

25 **A.** Correct.

1 **Q.** Ordinarily, if we go to this calendar that Mr. Frank
2 showed you, it was anticipated that there was going to be a
3 transition management agreement, correct?

4 **A.** Correct.

5 **Q.** You don't have personal knowledge why there wasn't,
6 correct?

7 **A.** I don't have personal knowledge why there wasn't.

8 **Q.** But you know from reading the March 1 e-mail there are
9 lawyers involved from State Street's end and both the
10 advisors and the broker-dealer, and somehow this becomes a
11 transition without a transition management agreement the
12 first time in your career.

13 **A.** Right. I just -- I recall being told that we didn't have
14 to have one in this instance because SSGA was involved.

15 **Q.** And you were not told whether the absence of a transition
16 management agreement was requested by AXA or requested by
17 their advisor, State Street Global Advisors, correct?

18 **A.** I don't know how.

19 **Q.** Don't know who -- but you do know that the client, AXA,
20 authorized the transition to go forward, correct?

21 **A.** That was my understanding, yes.

22 **Q.** You saw that LDO, whatever that means, that was
23 authorization to -- for State Street Global Advisors to let
24 the broker-dealer, State Street, go forward and do this huge
25 transition, correct?

1 **A.** The letter of direction, LOD, actually, that AXA sent to
2 SSGA said that they were directing SSGA to let State Street
3 Global Markets do the transition.

4 **Q.** Ordinarily the sequence is it that there's a request to
5 different providers to tell the client, you know, on what
6 terms and how they're going to conduct a transition, correct?

7 **A.** I'm sorry. Can you say that again?

8 **Q.** Ordinarily there's a sequence where AXA or a client would
9 say: I want to get a transition manager. They put it out to
10 a number of transition manager options, they get back some
11 response, and in this case, there was a pretrade estimate,
12 correct?

13 **A.** Correct.

14 **Q.** And a strategy proposal?

15 **A.** Correct.

16 **Q.** Except for this event, ordinarily what would come after
17 would be negotiations that would result in a transition
18 management agreement with a transition agreement, correct?

19 **A.** That's correct.

20 **Q.** And that would set forth the results of the negotiations
21 between State Street Global Markets and the client, correct?

22 **A.** Correct.

23 **Q.** And there were times when the agreement is at variance
24 with the pretrade; in other words, things changed as a result
25 of negotiations?

1 **A.** At time, correct.

2 **Q.** I want to quickly show you -- by the way, AXA was still
3 moving the parts. Even after March 7, correct, there was
4 still changes of assets that were going to be traded and not
5 traded, if you recall?

6 **A.** I recall that we had conversations with the portfolio
7 managers, but I believe by March 7th it was -- it was pretty
8 much locked in.

9 **Q.** Let me show you Exhibit 512 for identification. And this
10 is in no means meant to be critical. It's seven years ago.
11 So I've got the e-mails and I just want you to look at one on
12 March 9 and see if it refreshes your memory.

13 THE COURT: You just want her to read it to
14 herself?

15 MR. WEINBERG: Yes.

16 **A.** I see this, yes.

17 **Q.** Does that refresh your memory that they were still moving
18 parts to this deal even after the second pretrade on March
19 7th?

20 **A.** They were. So sometimes with fixed-income trades in
21 particular, if there's bonds that we can't find in the
22 market, we'll reach back out to the portfolio managers and
23 they'll give us substitutes.

24 **Q.** Do you recall during this transition informing at least
25 Mr. Carlin that you knew that this was not an agency trade,

1 this was going to be riskless principal?

2 **A.** I did see e-mails where he asked me to confirm that we
3 were trading as riskless principal, yes.

4 **Q.** Now, transition managers have a lot of responsibilities.
5 It's hard work, correct?

6 **A.** Correct.

7 **Q.** You do a lot of analysis; is that correct?

8 **A.** We do a lot of coordination, a lot of project management.

9 **Q.** And a lot of responsibility to meet schedules and to set
10 out the timing of trades, correct?

11 **A.** Correct.

12 **Q.** And then the broker-dealer does different things. They
13 go and execute the trades consistent with your instructions,
14 correct?

15 **A.** To be honest, I'm not exactly sure how the lines work
16 between the transition manager and the broker-dealer.

17 **Q.** This was a many, many, many billion-dollar transition,
18 was it not?

19 **A.** It was.

20 **Q.** Three mutual funds, each with a significant amount of
21 assets, correct?

22 **A.** Correct.

23 **Q.** And I'm going to show you very briefly --

24 MR. WEINBERG: If Your Honor please, can I approach
25 the bench, because I think we can do this quicker.

1 THE COURT: Yes.

2 Show Mr. Frank.

3 MR. WEINBERG: Yes.

4 (Discussion off the record.)

5 BY MR. WEINBERG:

6 Q. If I can just show you what looks like one of the
7 pretrades --

8 A. Okay.

9 Q. -- and bring you back seven years and ask whether or not
10 there was in one of the mutuals 6.7 -- more than 6.7 billion?

11 A. Yes, there was.

12 Q. And then in the second one another 2 billion?

13 A. That's correct.

14 Q. So we're up to 8.7. And then --

15 A. Sixteen.

16 Q. So we're over 10 billion in assets, correct?

17 A. Correct.

18 Q. Amongst the three mutuals. And some of those assets, if
19 I am correct, were traded -- the mutual funds sold certain
20 securities and then bought other securities, correct?

21 A. Well, we as transition managers, as a transition manager
22 hired to transition the portfolio, did that.

23 Q. Right. So even though there was 10 billion of assets in
24 play, there could have been more trading than just 10
25 billion. Correct?

1 **A.** Correct.

2 MR. WEINBERG: Can I just look at my notes, Your
3 Honor, for a second?

4 THE COURT: Yes.

5 (Pause.)

6 BY MR. WEINBERG:

7 **Q.** You received an e-mail from Ross on March 2 telling you
8 that he had talked to the traders; is that correct?

9 **A.** The one we saw earlier, yes.

10 **Q.** And Ross had his own conference room near the trading
11 floor, did he not?

12 **A.** Not to my knowledge. There were conference rooms, but I
13 don't think that Ross had his own one. He had an office.

14 **Q.** An office and then there were conference rooms nearby?

15 **A.** I don't recall that, no.

16 **Q.** The traders had their phones tape-recorded, correct?

17 **A.** Yes.

18 **Q.** And that was to protect the bank against any issues that
19 arose with clients regarding what they ordered and at what
20 rates, things like that, right?

21 **A.** I know that they had their phones recorded, yes.

22 **Q.** But not every phone at State Street has a tape-recorder
23 on it, correct?

24 **A.** Correct.

25 **Q.** Yours didn't and lots of other people didn't who weren't

1 traders?

2 **A.** To my knowledge, no.

3 **Q.** Had Mr. McLellan wanted to have a phone call with the
4 traders on March 2 without a tape-recording, he could easily
5 have asked them to go to the conference room or any of the
6 offices that didn't have tape-recording, correct?

7 MR. FRANK: Objection to what he could have done.

8 THE COURT: Overruled.

9 **A.** He could have asked them to go to a different room. He
10 could have, yes.

11 **Q.** And it was not a secret. In other words, everybody knew
12 that if you're going to call in to a trader, those calls are
13 going to be recorded, correct?

14 **A.** Correct.

15 (Pause.)

16 MR. WEINBERG: That's it.

17 THE COURT: Any redirect?

18 MR. FRANK: Very briefly, Your Honor.

19 **REDIRECT EXAMINATION BY COUNSEL FOR PLAINTIFF**

20 BY MR. FRANK:

21 **Q.** You don't know where Ross McLellan was on March 2nd, do
22 you?

23 **A.** No.

24 **Q.** And the traders sit on the trading desk, correct?

25 **A.** They do.

1 **Q.** And it would be extremely unusual if all the traders got
2 up from the trading desk and went to a conference room to
3 have a meeting about what to charge on a deal, would it not?

4 **A.** It would be, yes.

5 **Q.** Fair to say that would raise some eyebrows?

6 **A.** I suppose, yeah.

7 **Q.** How many calls happen on a trading desk in a given day?

8 **A.** I have no idea, but I would imagine quite a few.

9 **Q.** Probably hundreds?

10 **A.** I would imagine so, yes.

11 **Q.** And over the course of 2010 --

12 THE COURT: Well, don't imagine, so strike that.
13 She said she didn't know how many calls.

14 THE WITNESS: Okay.

15 BY MR. FRANK:

16 **Q.** They're calling up brokers all the time as part of their
17 job, correct?

18 **A.** They are. There's also electronic communication as well.

19 **Q.** So over the course of a year, there would be thousands
20 and thousands of phone calls recorded?

21 **A.** I would think so.

22 **Q.** Fair to say finding one phone call in that haystack would
23 be a job, wouldn't it?

24 THE COURT: Sustained. That's leading.

25 BY MR. FRANK:

1 **Q.** You were asked about whether .1 basis points is lower
2 than other typical commissions?

3 **A.** Yes.

4 **Q.** And you recall you testified to that effect on direct
5 examination?

6 **A.** Yes.

7 **Q.** How did \$1.3 million compare to what you typically earned
8 on a transition?

9 **A.** It was a high commission rate or it was a high commission
10 dollar trade for us.

11 **Q.** Mr. Weinberg showed you a document --

12 MR. FRANK: Marty, was that 491?

13 MR. WEINBERG: 496.

14 MR. FRANK: 496. Could we take a look at that
15 document, please, Max?

16 Thank you, Max. Can we blow that up?

17 THE COURT: That's in evidence, right?

18 MR. FRANK: This is in evidence, yes.

19 MR. WEINBERG: Yes, Your Honor.

20 THE COURT: All right.

21 BY MR. FRANK:

22 **Q.** Do you recall he showed you this document regarding Lance
23 Dial of SSGA legal asking for a certification --

24 MR. FRANK: Max, if you wouldn't mind highlighting
25 from "certification" in the second line.

1 Q. -- certification letter representing to AXA that our
2 commissions are reasonable and fair?

3 A. Yes.

4 Q. And that the commission charge is at least as favorable
5 as that given to comparable customers?

6 A. Yes.

7 Q. Do you see that?

8 A. I do.

9 Q. Do you know if those letters typically actually disclose
10 what the commission is?

11 A. I actually haven't seen one of those letters.

12 Q. So you don't know whether it tells the client what the
13 rate was that was charged?

14 A. I don't know.

15 Q. Or whether it just says that the commission is fair and
16 reasonable?

17 A. I don't know. I've never seen the letter itself.

18 Q. Now, Mr. Weinberg didn't show you any responses to this
19 e-mail. Have you ever seen the defendant's response to this
20 e-mail?

21 A. No.

22 MR. FRANK: May I approach, Your Honor?

23 THE COURT: You may.

24 MR. FRANK: Your Honor, could I have the ELMO?

25 THE COURT: Yes.

1 MR. FRANK: I believe the next Exhibit Number is
2 212 for us. The government would offer this document as
3 Exhibit 212.

4 MR. WEINBERG: No objection.

5 THE COURT: Admitted.

6 (Exhibit No. 212 admitted into evidence.)

7 BY MR. FRANK:

8 Q. You see this is the e-mail that Mr. Weinberg showed you.
9 Lance Dial of SSGA legal has raised with Mellissa that we
10 have a 17(e)(1), commissions with an affiliated broker-dealer
11 issue, in that we will have to sign a certification letter
12 representing to AXA that our commissions are reasonable and
13 fair and that the commission charged is at least as favorable
14 given to comparable customers?

15 A. Yes, I see that.

16 Q. Ms. Morris, can you read for the record how the defendant
17 responded to that e-mail?

18 A. He said, "Tell Lance that we'll worry about what's fair."

19 Q. Do you know if that certificate letter was ever sent?

20 A. I don't know.

21 MR. FRANK: No further questions.

22 MR. WEINBERG: Just two questions, Your Honor.

23 **RECROSS-EXAMINATION BY COUNSEL FOR DEFENDANT**

24 BY MR. WEINBERG:

25 Q. One --

1 MR. WEINBERG: May I ask them from here?

2 THE COURT: You may.

3 BY MR. WEINBERG:

4 Q. Mr. Frank asked you about whether 1.3 million is out of
5 the ordinary, large commission?

6 A. Correct.

7 Q. Is it a large commission for a \$10 billion-plus
8 transition?

9 A. It would be in line with a \$10 billion trade.

10 Q. It's not -- certainly not high for a \$10 billion
11 transition, right?

12 A. It's not high for a \$10 billion transition.

13 Q. Low for a \$10 billion transition?

14 A. I don't know.

15 Q. And lastly, the e-mail that Mr. Frank just showed you
16 where Ross says "Tell Lance," that's Lance Dial, the lawyer
17 for SSGA, as far as you know?

18 A. I would assume so, from the chain of the e-mail.

19 Q. And you see it's 3:39 p.m. in Boston?

20 A. Okay.

21 MR. FRANK: Objection to the time, Your Honor.

22 THE COURT: It's in evidence.

23 MR. FRANK: It doesn't say that the time stamp is
24 from Boston.

25 THE COURT: Overruled.

1 BY MR. WEINBERG:

2 Q. Is Mr. Carlin in Boston?

3 A. Mr. Carlin is in Boston.

4 Q. And do you know whether Ross was in Asia at the time with
5 a very different time zone than 3:39 p.m. Eastern time? Do
6 you recall from seven years ago that Ross was traveling
7 during this week and was e-mailing from Asia?

8 A. I don't remember. I feel like he was, but I don't
9 remember.

10 MR. FRANK: Your Honor --

11 BY MR. WEINBERG:

12 Q. And after you received an e-mail from Ross on March 2, do
13 you remember any further involvement of Ross in this
14 transition?

15 A. I don't remember it. I did see another e-mail talking
16 about that we were trading corporates one day.

17 MR. WEINBERG: Thanks very much.

18 Thank you, Your Honor.

19 THE COURT: You're excused. Thank you very much.
20 Are we -- counsel, same schedule we talked about
21 this morning, right?

22 MR. FRANK: Yes, Your Honor.

23 MR. WEINBERG: Yes, Your Honor.

24 THE COURT: So, ladies and gentlemen of the jury,
25 let me explain to you where we are.

1 So we're coming -- the government is almost at the
2 end of its case, the presentation of its evidence. So Monday
3 we'll resume -- you'll have the weekend obviously, and Monday
4 we'll resume with trial. I anticipate Monday is going to be
5 a short day, and let me explain to you why we're doing it
6 this way.

7 The government is going to have some evidence on
8 Monday, you'll hear that, and it probably -- it will
9 certainly be done by 1:00. And I just want to tell you that
10 you may well be done well before 1:00. But to keep -- and
11 the reason is the witness that the government is going to
12 present on Tuesday is coming from overseas and can't be here
13 on Monday. And so that's why there's that little gap.

14 In terms of keeping the case moving and efficient
15 presentation of the evidence in an orderly way that will make
16 it most comprehensible and the best presentation for you,
17 we're going to -- you'll have some evidence on Monday. I
18 don't think we'll go until 1:00. It's possible, but I don't
19 think so.

20 And then Tuesday -- and then I anticipate that
21 Tuesday morning the government, after that witness, will be
22 done with its presentation of evidence.

23 And then we'll turn to the defense, and I
24 anticipate that the defense is going to be presenting
25 evidence, and Tuesday we'll go 9:00 to 1:00. And we'll start

1 proceeding with the defense evidence and their presentation
2 of witnesses.

3 In terms of the overall schedule of the case, I
4 anticipate you will receive the case for your deliberations
5 no later than the beginning -- than early in the following
6 week. So we'll have next week. The latest you'll receive
7 the case I anticipate is early the following week, which is
8 sooner than we had talked about when you were selected as
9 jurors. We had talked about essentially two weeks from
10 yesterday. So what I'm telling you is same week but earlier
11 in that week right now you'll get the case. So no later than
12 that.

13 So we're ahead of schedule, which is good, and
14 we'll keep moving.

15 So don't discuss the case among yourselves, don't
16 discuss it with anyone else, don't do any independent
17 research, keep an open mind. You haven't heard all the
18 evidence, you haven't heard the closing arguments of the
19 lawyers or my instructions on the law.

20 Have a nice weekend. We'll resume on Monday at
21 9:00 a.m.

22 All rise for the jury.

23 (Jury left the courtroom.)

24 MR. WEINBERG: Judge, may Ross be excused?

25 THE COURT: Yes.

1 THE DEFENDANT: Thank you.

2 THE COURT: You can be seated.

3 I think, depending on how long this is, I might
4 just want you to tell me what the evidentiary issues are. I
5 don't know about you, but it's good to have a break around
6 1:00.

7 So just working backwards, the evidentiary issues
8 are, one, the objection to the witness on Tuesday. I
9 understand what that is. If you want to be heard more about
10 it, I'm happy to hear you more, but let's come back to that.

11 There's the challenge to the -- objection to the
12 agent testifying to the statements of Mr. McLellan in January
13 2012, right?

14 MR. GOLDSTEIN: Yes.

15 THE COURT: What's the gist of that, the basis for
16 that objection?

17 MR. GOLDSTEIN: It's a 403 objection, Your Honor.
18 They went to Mr. McLellan's house to ask him about ConvergeEx.
19 When you actually study the agent's report, the questions
20 relate to a time period other than what's at issue in this
21 case. Meaning State Street used ConvergeEx in the late --

22 THE COURT: I don't think the government intends to
23 ask about ConvergeEx.

24 MR. GOLDSTEIN: Which makes it all the more
25 misleading. Meaning the context for the question and answer

1 is compare and contrasting --

2 THE COURT: Tell you what, do I have the 302?

3 MR. FRANK: I do, Your Honor.

4 THE COURT: That may be helpful and then I'll --

5 MR. FRANK: It's highlighted.

6 THE COURT: If defense doesn't object, I'm happy to
7 take it.

8 MR. GOLDSTEIN: There's no objection.

9 THE COURT: The gist of your objection is that it's
10 about a different time period. Let me read the 302 and then
11 we'll see.

12 MR. GOLDSTEIN: Sure.

13 THE COURT: So that's the agent issue.

14 MR. FRANK: There's a secondary issue which is the
15 cross-examination of the agent and the scope of the
16 cross-examination.

17 THE COURT: If they go into the ConvergeEx, then you
18 might want to get more into -- things that you wouldn't have
19 gotten into.

20 MR. FRANK: Well, no, I don't intend to get into
21 ConvergeEx. I don't think they should be allowed to get into
22 ConvergeEx, because the issue is the defendant's state of
23 mind, not what's going on in the mind of the agent.

24 THE COURT: So if the government gets what it wants
25 on direct, I overrule that objection, what do you want to

1 elicit on ConvergeX and why would it --

2 MR. GOLDSTEIN: What the government wants to do is
3 elicit statements by Mr. McLellan regarding State Street's
4 disclosure practices.

5 THE COURT: I think you know what I should do -- I
6 should read this first. I'm wasting your time without
7 reading it.

8 So that's the agent. What's the other -- the two
9 issues with the agent, I get that. There's an issue with
10 respect to the other agent witness who is going to read
11 certain documents.

12 MR. WEINBERG: It really goes back in some respects
13 to our pretrial give-and-take on evidentiary issues. The
14 government is going to try to offer through the agent certain
15 exhibits that we will have evidentiary objections to. And
16 maybe the best way is for us to give Your Honor --

17 THE COURT: Give me the exhibits, the ones you're
18 going to object to, and then I'll look at them.

19 And there's no objection to the agent reading them.
20 It's only an objection to whether he can read all of them or
21 just some of them.

22 MR. WEINBERG: I say as long as the agent reads it
23 in a neutral voice, then that's fine. Once they're admitted,
24 there's an issue.

25 So can I get that to Your Honor tomorrow morning?

1 THE COURT: How many are there? What are we
2 talking about?

3 MR. FRANK: Well, we're still identifying them, but
4 right now there's about 15 or 16 total e-mails. There may be
5 one or two more.

6 THE COURT: These are internal, like, State Street
7 e-mails or something?

8 MR. FRANK: These are e-mails generally to the
9 defendant or from the defendant. There are a couple of
10 e-mails -- there are a couple of AXA-related e-mails we
11 contend are co-conspirator statements that are not to or from
12 the defendant; there's only a couple of those.

13 THE COURT: So fine to get them to me -- either
14 way, you're not objecting to everything. Is this an agent
15 who's here or coming up from DC?

16 MR. FRANK: He will be here.

17 THE COURT: So you can get them to me, you talk to
18 each other, find out what's what, get them to me, I'll look
19 at them, and then I'll either hear you Monday morning --
20 probably want to hear what the issue is once I've read them.
21 That's fine. If you want to get them to me any time tomorrow
22 is fine.

23 MR. WEINBERG: That would be great.

24 THE COURT: It doesn't matter when tomorrow. I'm
25 going to look at them on Sunday.

1 MR. WEINBERG: So perhaps the best way, because I
2 don't have them electronic, is to send Mr. Frank a list of --
3 he can send me a list of what he's offering. He sent me a
4 partial list last night. I'll identify what the defense is
5 objecting to, and in shorthand, whether there's no
6 conspirator statement or relevance. And perhaps if the
7 government can --

8 We can PDF a copy to you. Showing my technological
9 lack of skills.

10 But I'll make the objections and Mr. Nemtsev will
11 get you the documents.

12 THE COURT: Okay. Are there other --

13 MR. WEINBERG: Can we do that through an e-mail
14 tomorrow sometime?

15 THE COURT: Yes. Yes, e-mail -- do you have my law
16 clerk's e-mail?

17 MR. WEINBERG: I don't, but --

18 THE COURT: He can give it to you at the end of the
19 hearing. And copy of the government on it.

20 MR. WEINBERG: Of course.

21 THE COURT: Is that all of the universe of
22 evidentiary issues?

23 MR. FRANK: There's an issue -- are you going to
24 brief the issue on the rebuttal? So we have a witness who's
25 flying in from overseas this weekend. He was originally

1 going to be --

2 THE COURT: This is the one Tuesday?

3 MR. FRANK: No.

4 THE COURT: Different witness.

5 MR. FRANK: Different witness. This is Graham

6 Dixon of Inalytics. You'll recall --

7 THE COURT: Yes, I do.

8 MR. FRANK: So Inalytics --

9 THE COURT: He's testifying on Monday.

10 MR. FRANK: He's not testifying on Monday. He was
11 originally going to be a witness in our case in chief. We've
12 decided not to call him in our case in chief. I'd like to
13 reserve the right to call him as a rebuttal witness.

14 I sent Mr. Weinberg a letter yesterday, suggesting
15 I think his testimony is fact testimony and/or lay opinion
16 testimony. But in light of the defense's objection at the
17 start of this trial to Mr. Boomgaardt's testimony, in an
18 abundance of caution, I've identified him --

19 THE COURT: Remind me of that objection.

20 MR. FRANK: It was an objection that his testimony
21 had strayed into expert --

22 THE COURT: Oh, yes.

23 MR. FRANK: I identified Mr. Dixon -- I suggested
24 that to the extent some of his testimony may be deemed
25 similarly to be expert testimony, we were identifying him as

1 a rebuttal expert, and I set forth an additional disclosure.

2 So I understand Mr. Weinberg is objecting to that.

3 MR. WEINBERG: We're going to brief it, Your Honor,
4 so --

5 THE COURT: At the moment -- you're only going to
6 call him as a rebuttal person?

7 MR. FRANK: Correct. But the issue is he's flying
8 in this weekend.

9 THE COURT: Yes.

10 MR. FRANK: And the other issue is, to the extent
11 the Court determines that he is or is not an expert and to
12 the extent it nonetheless permits his testimony, I would ask
13 that he be permitted to be in the courtroom for the testimony
14 of the defense experts. Not the fact witnesses. To the
15 extent that his testimony is also fact testimony, I'm not
16 asking for that. But to the extent it is responsive to the
17 expert testimony and that he's deemed an expert, I would ask
18 that he be permitted --

19 THE COURT: If I determined -- if I said he's not
20 an expert, then you don't want him in the courtroom.

21 MR. FRANK: I don't want him in the courtroom. I
22 still think his testimony -- I don't think I can have him in
23 the courtroom if he's not an expert.

24 THE COURT: Right. You're not suggesting to me --
25 you're not arguing for an exception to the sequestration rule

1 for him if he's deemed not an expert. But if he is deemed an
2 expert, then you think the rules shouldn't apply to him and
3 you would want him here just for the expert witnesses so he
4 could respond that.

5 MR. FRANK: That's correct, Your Honor.

6 THE COURT: And you want to brief the question.

7 MR. WEINBERG: Yes, Your Honor.

8 THE COURT: Fine.

9 Oh, I see. Is the issue with him flying in, that
10 he wouldn't fly in -- if I deemed -- if I right now I just
11 said -- in a perfect world, if I read the brief and heard
12 your response and had a ruling and it all happened
13 instantaneously and there were no implementation shortfall,
14 then --

15 MR. FRANK: I'm sensing there would be a shortfall.

16 THE COURT: Then you might not have him -- if I
17 said he's not an expert, just fact, you might not have him
18 fly in this weekend, or it wouldn't matter?

19 MR. FRANK: No, actually there's a decision tree.
20 Because I think, actually, even if he's a fact witness, his
21 testimony comes in as either fact or lay opinion testimony.
22 I only identified him as an expert in an abundance of
23 caution.

24 THE COURT: What does that all have to do with him
25 flying in this weekend? I'm trying to figure out why that

1 matters.

2 MR. FRANK: I guess the one decision would be if
3 the Court were to determine that his testimony were so
4 constricted as a fact witness that we couldn't get into any
5 of the issues that I've identified, then we might make a
6 decision. But I realize now in talking it through that he
7 probably needs to just fly in and we'll brief the issue.

8 MR. WEINBERG: Or send him daily copy and wait and
9 see if there's anything to rebut.

10 THE COURT: Well, I'm -- far be it for me to tell
11 the executive branch how to spend its money. So you fly him
12 in or not, that's up to you. It's not like you're hanging on
13 something from me about flying him in. So fine.

14 So I think what I want to do is I'll read the 302.
15 You'd like me to rule on this before Monday because that
16 affects whether this agent comes up.

17 MR. FRANK: That's correct, Your Honor.

18 THE COURT: All right. How about we reconvene
19 at 2:00. I think we'd all be happier. I'd be happier.

20 MR. FRANK: That's the royal we.

21 MR. WEINBERG: Judge, is there any way I can burden
22 the Court to make it quarter of 2:00? I've got a pretty
23 long-standing 2:30 commitment.

24 THE COURT: Fine, 1:45. The only thing we'll talk
25 about at 1:45 is this witness.

1 MR. WEINBERG: And can Mr. McLellan be excused from
2 this?

3 THE COURT: He's excused.

4 THE CLERK: This matter is adjourned.

5 (Court in recess at 1:12 p.m.

6 and reconvened at 1:48 p.m.)

7 THE DEPUTY CLERK: All rise, the McLellan matter is
8 back in session.

9 THE COURT: Please be seated.

10 So I read the 302. I have to say, it seems like it
11 more goes to weight than admissibility. I understand that
12 some of the questions concern the 1990s, but based on 302, it
13 seems fairly open ended and later there's a discussion about
14 not taking a spread that goes up -- it sounds like it's
15 talking about a contemporaneous period of time.

16 MR. GOLDSTEIN: Well, I don't see the
17 contemporaneous section, Your Honor.

18 THE COURT: Well, at the -- two ways. One is on
19 the last page, there's a summary of a discussion and -- about
20 a meeting a couple months ago and then Mr. McLellan says,
21 "State Street does not take spread."

22 And it is an earlier time period that -- he's
23 certainly being asked about a period in late 1990s, 2000s,
24 but some of it is more recent. I guess what I would say is,
25 look, this is how it strikes me, it's -- that time period is

1 a -- makes the evidence less powerful, but not so far out
2 that I would say I wouldn't admit it.

3 MR. GOLDSTEIN: So here's my issue in a nutshell.
4 It's not just the time period. That's one feature of this,
5 but there are questions about a matter, State Street's
6 relationship with ConvergeEx, the use of ConvergeEx, back
7 before State Street even had a London desk, before they had
8 an Asia desk. We're talking about early 2000s.

9 So that's the context of Mr. McLellan talking to
10 them, contrasting State Street from ConvergeEx during that
11 time period. And so the problem is that the Government wants
12 to elicit these statements from Mr. McLellan, as if he's
13 talking about the transitions at issue, or as if he's talking
14 about the practices in place when these transitions at issue
15 happened. And so I think there is a very substantial
16 misleading -- potential misleading of the jurors, confusions
17 of the issues. I don't think it just goes to weight. I
18 think the problem is that the jury is going to get the
19 impression that Mr. McLellan is making these statements and
20 they have any relevance whatsoever to what the practices were
21 for these particular transition clients. And I think if we
22 learned anything over the last couple of weeks, other than
23 the fact of Mr. Frank not being able to sit down, was
24 that each of these transitions are *sui generis* in a sense
25 meaning that you --

1 THE COURT: It is the new cancer, you know.

2 MR. GOLDSTEIN: They all have individual
3 negotiations, they all have different contracts or
4 potentially have different contracts. And so for an agent to
5 take the stand and say I spoke to Mr. McLellan, he said
6 here's the practice with State Street, it's incredibly
7 misleading, when it bears no relationship to the transitions
8 at issue. The Government doesn't need these statements and
9 so whatever probative value they have, I would argue they're
10 substantially outweighed by a confusion of the issues,
11 misleading of the jury. And to the extent the Government
12 needs any piece of this, which I contend would be that Mr.
13 McLellan forwarded this spreadsheet, they can call the agent
14 for that particular purpose.

15 Mr. McLellan did forward the ConvergeEx, he said he
16 forwarded the ConvergeEx spreadsheet. That's what they're
17 trying, in terms of relevance to this case, but all of these
18 other statements concern an entirely different subject
19 matter, a different time period, and bear no relationship to
20 the actual transitions at issue, but the jury is going to
21 come away with the sense that Mr. McLellan was saying, State
22 Street never does this. State Street does that.

23 THE COURT: You're going to have to do
24 cross-examination that he hadn't been asked about -- you
25 didn't ask him about these about these transitions, you

1 didn't talk about this, you didn't talk about that. You were
2 talking about this, he told you about a time period when they
3 didn't have a desk to do the trading, which was 1990s, and
4 all of that?

5 MR. GOLDSTEIN: That certainly helps. But given
6 that -- given all of that predicate, I don't know why the
7 relevance isn't outweighed by the potential confusion of the
8 jury or misleading the jury. And that is my argument in a
9 nutshell.

10 MR. FRANK: Just with respect to the timing point,
11 Your Honor. Your Honor pointed to that second to last
12 paragraph. And the paragraph begins, "Mr. McLellan met with
13 Velez a couple of months ago."

14 And then it says, "McLellan believes Velez was
15 pumping him for information about spread. McLellan advised
16 State Street does not," present tense, "take spread." It's
17 present tense and it's in January of 2012. So it's exactly
18 contemporaneous with the issues in this case and he ran the
19 transition business. So obviously they're talking about
20 spreads in the business that he ran and counsel can make his
21 arguments on cross-examination, within limits.

22 MR. GOLDSTEIN: But it's not obvious what he was
23 talking about and the entire conversation had to do with
24 ConvergEx and so --

25 MR. FRANK: No, it didn't.

1 MR. GOLDSTEIN: That's the exact point, meaning
2 they want to elicit this statement as if he's talking about
3 these transitions. And has no -- I don't think the
4 Government is even contending that this statement had
5 anything to do with these transitions and so --

6 THE COURT: He wasn't asked about these transitions
7 in the interview.

8 MR. FRANK: Absolutely not, Your Honor. We didn't
9 know about them at the time, but the point is he was talking
10 about his practices in his business. It goes to his state of
11 mind. It's going to be five minutes of testimony about his
12 state of mind. That's it.

13 THE COURT: The 403 objection raised, Mr.
14 Goldstein, I understand, but it's overruled for, generally,
15 the reasons that I articulated.

16 There was a -- I'm not clear what it is that you
17 might be doing in cross that Mr. Frank might be objecting to,
18 but I had the sense there was something -- some issues along
19 those lines.

20 MR. GOLDSTEIN: Well, I think I need to explain the
21 context for those statements. That they went there that
22 night, they had questions regarding a different subject
23 matter. ConvergeEx had nothing to do with State Street's
24 transition management business. When he asked these
25 questions, it was in that context. Mr. McLellan -- the same

1 things Your Honor just said.

2 He wasn't talking about the specific transitions,
3 he was talking generalities, but I have to get into the
4 context. Otherwise, I think it's incredibly misleading.

5 MR. FRANK: That's not an issue for us, Your Honor.
6 In fact, we're going to establish all of that on direct. The
7 issue is, what I heard counsel to suggest earlier, and maybe
8 I misunderstood, was that they wanted to get into the
9 ConvergeEx business model, what the agent was investigating
10 with respect to ConvergeEx and what was happening at ConvergeEx
11 and that's irrelevant. We've never argued --

12 THE COURT: Pause.

13 MR. GOLDSTEIN: Maybe. Meaning I may need to
14 establish that the context of the conversation was a practice
15 that is simply foreign to what the practice was at State
16 Street. My understanding of the ConvergeEx model was that
17 despite trade being US based and despite ConvergeEx having an
18 US-based broker-dealer, they were sending the orders to
19 another broker-dealer they had in Bermuda, so that they could
20 do a markup in Bermuda, through that broker-dealer, which was
21 their own affiliate, send it back to the US, where they'd
22 interpose a second markup.

23 And so it's -- in our position and our contentions,
24 it's entirely different than what the State Street, what
25 their operations were. And it's that context that I think

1 would give the jury some understanding of what the statements
2 are that Mr. McLellan was making.

3 MR. FRANK: So the issue is the defendant's state
4 of mind, not what ConvergeEx was doing and we're only asking
5 questions about what the defendant said about his own
6 business and he said we don't take spreads and he said we
7 fully disclose our fees and what we charge. That's all.

8 THE COURT: But they told him they were asking
9 about ConvergeEx.

10 MR. FRANK: They came to him and said they were
11 investigating ConvergeEx. That's it. Then they asked him
12 questions. They didn't volunteer information to him.

13 THE COURT: Sure.

14 MR. FRANK: So the issue about what he may have
15 thought about what ConvergeEx was doing, unless he said in
16 here -- and I don't see it in here -- that he knew ConvergeEx
17 was using offshore entities to apply spreads and routing
18 things back to New York, there's no issue of what -- the
19 Government was investigating what ConvergeEx was doing and
20 they talked to him about what he was doing.

21 MR. GOLDSTEIN: I just think it's incredibly unfair
22 to let the Government introduce statements from Ross, without
23 us also being able to also explain at the same time what the
24 differences were between ConvergeEx and State Street
25 practices, given that's the entire context for this

1 conversation. Mr. McLellan is being interviewed about
2 ConvergEx, therefore, you can assume that he understood what
3 the practices were, which is what he's talking to the agents
4 about.

5 MR. FRANK: In fact, what he says here is he was
6 never -- McLellan said he was never informed that -- by
7 ConvergEx, that a spread was being taken. He suspected it.
8 There's nothing in here suggesting that he knew that trades
9 were being routed through Bermuda, that it -- the mechanism
10 for any of that. The only statement he made was that he
11 suspected they were making money above and beyond what they
12 told State Street they were making.

13 MR. GOLDSTEIN: And this is just a summary of the
14 conversation. And so I'm allowed to test the witness in
15 terms of what they spoke about and whether or not that was a
16 subject matter of the discussion and he can answer the
17 questions yes or no.

18 THE COURT: So I'm not ruling anything out. It is
19 just a summary. It's not tape-recorded, as far as I can tell
20 from this. But the issue is -- I think the relevant issue is
21 what did Mr. McLellan say, what was his state of mind. So
22 the -- I don't necessarily agree with Mr. Frank, that you
23 can't ask some of the more specific things that he's
24 objecting to, but depending on -- but I don't necessarily
25 agree. I think it depends.

1 In other words, that if -- if the agent, for
2 example, went in and said, "I'm investigating ConvergeEx, tell
3 me everything you know about ConvergeEx," and just started
4 writing things down, what else do you -- and just asked
5 nonleading questions. What else do you know about ConvergeEx,
6 what else do you know? Do you know anything else that they
7 did? Do you know anything else about that? And said nothing
8 else and then what he reports is just all of that.

9 The fact that -- and none of that, and he says that
10 and he tells us whatever McLellan said that the Government
11 wants to elicit. Then -- and none of that is about this
12 double commission you described. I don't know how
13 relevant -- like getting deeply into the ConvergeEx model and
14 that scenario, might not be that relevant. On the other
15 hand, depending on what he asked or how, and so we'd have to
16 see. I don't think --

17 I think the context matters. I mean, he didn't
18 make these statements in a vacuum. And on the other hand, I
19 do think that -- I do think the focus is -- the relevance of
20 this is what did he say and what did he know and what was his
21 state of mind and to shed light on the things he said.

22 MR. FRANK: So if I understand Your Honor
23 correctly, because it's relevant to our decision to call the
24 witness, what the agents said to McLellan and what McLellan
25 said to the agents can be delved into; what the agents,

1 themselves, knew about ConvergeEx that they didn't share with
2 McLellan cannot be delved into?

3 THE COURT: Well, I didn't say that, but I
4 understand your point. I think it depends. I don't know
5 what the agents knew or know and this case isn't about
6 ConvergeEx. On the other hand, there is evidence about
7 ConvergeEx in this case, that you elicited. And I can't
8 remember if they objected and I overruled or they didn't, but
9 it's in evidence.

10 MR. FRANK: But what we elicited was what the
11 conspirators understood about.

12 MR. JOHNSTON: I've only ever been a Government
13 attorney, Your Honor.

14 MR. FRANK: Your Honor, but their own jury
15 instructions ask for more than what he, counsel, is
16 suggesting is what we have to prove.

17 THE COURT: Here's the thing. I want to think
18 about this. I'll just tell you the two considerations that
19 I'm thinking about. One is that I am -- you know, it gives
20 me pause that admitting some of this, which is inferential
21 evidence, has the effect of telecommunicating -- or
22 communicating directly to the jury what Mr. Weinberg is
23 saying about, that the bank paid a lot of money, and the
24 implications that come with that, in terms of guilt, and on
25 those points.

1 On the other hand, I am concerned -- on the other
2 hand, this is the other thing I'm weighing, sort of the point
3 that Mr. Johnston makes that these are big -- both companies
4 are big companies. There's two that potentially are
5 financially affected, or two that are in play for that.
6 They're both big companies and that the biggest single
7 expense you have in the -- in the universe here is the money
8 you paid -- that they paid to the Government -- or different
9 parts of the Government. And I'm concerned about the issue
10 you raise and unfairly hamstringing your ability to argue
11 the -- you know, the facts that support that element. I hear
12 that, too. And I'm just thinking about that, because I think
13 they're both important considerations, so I want weigh sort
14 of where that goes.

15 MR. FRANK: So in light of that, I mean, does it
16 make sense to defer our witnesses until Tuesday? I don't
17 know how we're supposed to prepare the witness to testify if
18 we can't tell them what's within bounds and what's not within
19 bounds.

20 MR. WEINBERG: The only remaining issue for direct
21 examine, because if you put on the FBI agent, you put him on
22 at your own peril. And Your Honor will make rulings and we
23 know the ground rules regarding approaching the bench.

24 In terms of the State Street witness, we'll come at
25 8:30, we have only one thing to resolve, which is the

1 formular of what he is allowed to say about potential harm to
2 State Street, but we would -- we have an out-of-state witness
3 coming in Tuesday --

4 THE COURT: We're going to go forward on Monday.
5 Here's the thing. As I understand with respect to the FBI
6 agent, the issue is basically -- you have two issues.

7 One, you have a universe of things you would think
8 about, which is fine with respect to calling the witness.
9 And the other more particular is, to the extent the defense
10 decides to ask at 8:30 whether they -- decides to ask to go
11 into this other area and whether I rule after hearing from
12 you, yeah.

13 If I rule no, it doesn't change anything you're
14 going to do. If I rule yes, it might, and so maybe we'll
15 meet a little -- maybe we'll meet at 8:15 and then we have
16 time to talk, and there's a little more time before 9:00 with
17 respect to that.

18 With respect to the State Street witness, the
19 reality is that it's a complicated issue. It implicates some
20 of the things I'm going to think about it and I'll either
21 issue something over the weekend, or we'll talk about it
22 Monday morning at 8:15.

23 All right, we're adjourned.

24 Wait. Will you give this back to Mr. Frank.

25 (Court in recess at 2:23 p.m.)

CERTIFICATION

We certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of our skill and ability.

/s/Debra M. Joyce June 15, 2018
Debra M. Joyce, RMR, CRR, FCRR Date
Official Court Reporter

/s/Rachel M. Lopez June 15, 2018
Rachel M. Lopez, CRR Date
Official Court Reporter